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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KWABENA MAWULAWDE, M.D., PETITIONER

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, DANIEL W. RAHN, M.D., INDIV. AND IN HIS OFFICIAL CAPACITY AS PRESIDENT, MEDICAL COLLEGE OF GEORGIA DAVID STERN, INDIV. AN IN HIS OFFICIAL CAPACITY AS DEAN, SCHOOL OF MEDICINE, MEDICAL COLLEGE OF GEORGIA, DON SNELL, INDIV. AND IN HIS OFFICIAL CAPACITY AS PRESIDENT AND CEO, MCG HEALTH, INC., MCG HEALTH, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the scope of discovery in the trial court was improperly limited to the allegations raised in the complaint in a Title VII racial discrimination case brought by a black faculty member against his former employer, a public college, in light of this Court's decisions in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990); and *Keyes v. School District No. 1, Denver Colorado*, 413 U.S. 189 (1973).

II. Whether Petitioner could properly file a Rule 15 motion for leave to amend his racial discrimination complaint after the expiration of the time period within which to amend as allowed by the Rule 16(b) scheduling order entered in the case, where some of the material facts underlying the proposed amended claims were obtained from discovery that was initially withheld under a state law claim of privilege, and ultimately produced after the expiration date designated in the scheduling order.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals affirming the judgment of the district court was not reported, 2010 U.S. App. LEXIS 723 (2010), and is reproduced in the Appendix herein at 1a and 2a. The district court's order granting the defendants' motion for summary judgment was not reported and is reproduced in the Appendix herein at 3a - 45a. Other opinions at issue were not reported and are available at 2009 U.S. Dist. LEXIS 104068; 2008 U.S. Dist. LEXIS 8979, and 2007 U.S. Dist. LEXIS 62700.

JURISDICTION

On April 5, 2010, the Eleventh Circuit Court of Appeals affirmed the United States District Court for the Southern District of Georgia's judgment entered for the defendants. Pet. App. 1a. On June 1, 2010, the Eleventh Circuit Court of Appeals denied the Petitioner's timely motion(s) for rehearing. Pet. App. 44a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

A. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2(a)(1)-(2),

(A) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

B. 42 U.S.C. § 1981

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to have the full benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

C. USCS Const. Amend. 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case concerns the nature, scope, and extent of discovery that should be allowed in an action for race discrimination in the hiring and promotion of faculty in institutions of higher education. This Court in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) held that,

> "the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial," and that, "ferreting out this kind of discrimination is a great, if not compelling, governmental interest. Often [] disclosure of peer review materials will be necessary in order [] to determine whether illegal discrimination has

> taken place. Indeed, if there is a 'smoking gun' to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files."

This case is not a tenure case but instead is a Title VII racial discrimination action that was brought by Petitioner after he was terminated in December 2003, after being informed by letter that he was being re appointed for the 2003 - 2004 academic school year.

Throughout discovery in the district court, Petitioner had sought discovery of information contained in the personnel files and credentialing files of similarly situated faculty members at the Medical College of Georgia. The Respondents objected to producing the discovery sought by Petitioner. See *Mawulawde v. Board of Regents of the Univ. Sys. of Ga.*, 2007 U.S. Dist. LEXIS 62700. Unlike the peer review materials at issue in *University of Pennsylvania*, the Respondents had withheld discovery of the faculty members credentialing information in this case based upon Georgia's "medical peer review" privilege since the faculty members at the Medical College of Georgia are also physicians. Consistent with the Petitioner's arguments that much of the information being sought here was not even privileged under Georgia law, in *Hospital Authority of Valdosta and Lowndes County v. Meeks*, 285 Ga. 521, 524-525 (2009), the Georgia Supreme Court held that, "[u]nless the credentialing information involves the evaluation of the quality and efficiency of actual medical services, it does not come within the peer review and medical review privileges of *OCGA §§ 31-7-133(a)* and *31-7-143*."

After the time period had already expired for the parties to amend the pleadings pursuant to the Rule 16 scheduling order, the Eleventh Circuit Court of Appeals in *Adkins v. Christie*, 488 F.3d 1324, 1329 (11th Cir. 2007) concluded that, "the medical and peer review process does not warrant the extraordinary protection of an evidentiary privilege in federal civil rights cases." On August 24, 2007, the district court entered an order providing that,

> "Plaintiff is free to reconvene any new depositions necessary to pursue any inquiries previously foreclosed by the Magistrate Judge's peer review ruling. In any event, all discovery is to be completed within 60 days of the date of this Order. Thereupon, the parties shall have 15 days to supplement their materials either in support or opposition to summary judgment."

Mawulawde v. Board of Regents, 2007 U.S. Dist. LEXIS 62700, *34-*35. On February 7, 2008, the district court entered another similar order *Mawulawde v. Board of Regents*, 2008 U.S. Dist. LEXIS 8979, after having closed the case pending this Court's disposition of a Petition for Certiorari filed in this Court in the *Adkins* case which was denied on January 7, 2008. *Adkins v. Christie*, 552 U.S. 1131.

In the February 7, 2008 Order reopening the case, the district court ordered that "[a]ny supplemental brief filed regarding the pending motions for summary judgment SHALL BE LIMITED to issues raised by the production of confidential peer review material pursuant to Adkins. *Mawulawde v. Board of Regents*, 2008 U.S. Dist LEXIS 8979, *3. In

June 2008, after having obtained peer review documents in discovery from the Respondents, Petitioner filed a motion for leave to amend his Complaint and a motion, a motion for extension of discovery (Pet. App. 48a - 70a), and a motion pursuant to Rule 56(f) in lieu of filing an amended response to the defendants' motion for summary judgment. In his motion seeking additional discovery, Petitioner attached several of the documents that had been withheld pursuant to Georgia's peer review privilege, attempted to explain why he thought the documents had been withheld, and attempted to show how the documents could be used in order to obtain additional discoverable information that could be used in opposing the Respondents' motions for summary judgment. Pet. App. 48a -70a.

In his motion seeking additional discovery, Petitioner also pointed out that some of the recently produced "peer review" information could be used as circumstantial evidence that does not fit neatly in the *McDonnell Douglas* framework but that may nonetheless be relevant to a showing of pretext citing *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641 (11th Cir. 1998). Pet. App. 63a. Because the district court denied Petitioner's *Rule 56(f)* motion simultaneously with the Order granting the Respondents' motions for summary judgment, Petitioner never had the opportunity to include any of the information he obtained during the limited "peer review" discovery period other than that attached to his motions seeking additional discovery. See *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984), "Even if the plaintiff were incorrect in arguing that the record was insufficient, he was entitled to be so informed in order

that he might respond to the district court's proposal to grant summary judgment with whatever arguments and evidence in the record that he could muster. By simultaneously denying the plaintiff's motion for a continuance and granting summary judgment, the district court deprived the plaintiff of the latter opportunity." Further, in the same Order, the district court denied Petitioner's motion for leave to amend to add a claim pursuant to 42 U.S.C. § 1981 and a state law breach of contract claim. Pet. App. 12a.

REASONS FOR GRANTING THE PETITION

As to the first question presented for review, Petitioner submits that this Court has jurisdiction to review the district court's order granting the defendants' motions for summary judgment because it was based upon an incomplete record. As held by this Court in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) "the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial," and "ferreting out this kind of discrimination is a great, if not compelling, governmental interest."

Given the time period that has elapsed since the Eleventh Circuit Court of Appeals decided *Harris v. Birmingham Board of Education*, 712 F.2d 1377 (11th Cir. 1983), this Court should decide if the type and scope of information considered by the *Harris* Court should be discoverable today and what, if any, time limitations should be placed on Petitioner's discovery of historical evidence and its use in his individual disparate treatment case. In *Harris*, the Eleventh Circuit Court of Appeals held that, "the trial court's

finding on the ultimate issue of discrimination is clearly erroneous and that the case was decided under an erroneous view of the controlling law regarding the weight to be given to past history of discrimination, lack of standards, and lack of objective criteria for hiring and promotion." *Id.*, at 1384. This is precisely the type of information that Petitioner sought during discovery and would have been able to obtain by using the credentialing information contained in the personnel and credentialing files of the faculty at the Medical College of Georgia.

See also *Burns v. Thiokol*, 483 F.2d 300, 305 (5th Cir. 1973), wherein the Eleventh Circuit Court of Appeals held that,

> "[o]ur wide experience with cases involving racial discrimination in education, employment, and other segments of society have led us to rely heavily in Title VII cases on the empirical data which show an employer's overall pattern of conduct in determining whether he has discriminated against particular individuals or a class as a whole."

The Burns Court further held that, "[e]ven though a suit seeks only individual relief for an individual instance of discrimination, and is not a "pattern or practice" suit by the government or a class action, the past history of *both* Black and White employees is surely relevant information." *Id.*, at 306.

Here, in addition to thwarting Petitioner's ability to establish probative historical evidence, Petitioner contends that the district court abused its

discretion in limiting discovery to the department of surgery at the Medical College of Georgia, and that this limitation is in conflict with the decision in *Duke v. University of Texas, El Paso*, 729 F.2d 996 (5th Cir. 1984), wherein the Fifth Circuit Court of Appeals held that, "[i]ndisputably, Duke's ability to show that UTEP's explanations were pretextual was central to her discrimination claim. That effort was prejudiced by the cropping of her opportunity to discover the practices of the other university departments." In moving for a protective order to preclude producing the discovery requested, the university had argued that, "because relevant personnel decisions were made at the department level, data about other departments would not lead to admissible evidence."

The Fifth Circuit in *Duke* further provides that,

> "[w]hile UTEP successfully argued to the district court that relevant decisions were made at a departmental level, Duke was not allowed the opportunity to place that asserted "fact" in context. We cannot say that this effort was here so improbable of success that all discovery from other than the biology and math departments ought to have been denied. . . . Under the circumstances, failure to allow the requested discovery was an abuse of discretion. Though we are reluctant to find abuse when the trial court's discretion is as wide as it is in the superintendence of discovery, we have done so where the facts mandated such a finding."

Id., at 997.

As to the second question presented for review, Petitioner contends that there is a need for this Court to exercise its supervisory powers and hold that Petitioner's motion for leave to file his Second Amendment to Complaint should have been granted in accordance with *Foman v. Davis*, 371 U.S. 178 (1962), due to the Respondents' delay in producing evidence that could be used to support the amended claims, and the similarity of those claims to the claims in the original Complaint.

CONCLUSION

In light of the foregoing, Petitioner requests that his petition for certiorari be granted.

Respectfully Submitted,

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No. 09-12130, No. 09-16172
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KWABENA MAWULAWDE, M.D.,
Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, DANIEL W. RAHN, M.D., Indiv. and in his Official Capacity as President, Medical College of Georgia DAVID STERN, Indiv. an in his Official Capacity as Dean, School of Medicine, Medical College of Georgia, DON SNELL, Indiv. and in his Official Capacity as President and CEO, MCG Health, Inc., MCG HEALTH, INC.,
Defendants-Appellees.

April 5, 2010, Decided

April 5, 2010, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeals from the United States District Court for the Southern District of Georgia. D. C. Docket No. 05-00099-CV-1. D. C. Docket No. 05-00099-CV-1.

COUNSEL:For Kwabena Mawulawde, Appellant: Eric Emanuel Wyatt, George W. McGriff & Associates, ROSWELL, GA.

For Board of Regents of the University System of Georg, Daniel W. Rahn, Appellees: Alana Rochelle Kyriakakis, Hull, Towill, Norman, Barrett & Salley, P.C., AUGUSTA, GA.

For David Stern, Appellee: Thomas W. Tucker, Tucker, Everitt, Long, Brewton & Lanier, PC, AUGUSTA, GA.

For Don Snell, Appellee: James B. Ellington, Hull Barrett, PC, AUGUSTA, GA.

For MCG Health, Inc., Appellee: James B. Ellington, Hull Barrett, PC, AUGUSTA, GA; Thomas L. Cathey, Hull, Towill, Norman, Barrett & Salley, P.C., Augusta, GA.

Before BIRCH, BARKETT and KRAVITCH, Circuit Judges.

OPINION

PER CURIAM:

After careful review of the record and briefs of the parties, as well as having had the benefit of oral argument, we AFFIRM the judgment of the district court.

Filed 03/27/2009

CV 105-099

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
AUGUSTA DIVISION

KWABENA MAWULAWDE, M.D., Plaintiff, v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, MCG HEALTH, INC., d/b/a MCG HEALTHCARE, DANIEL W. RAHN, M.D., individually and in his official capacity as President, Medical College of Georgia, DAVID STERN, M.D., individually and in his official capacity as Dean, School of Medicine, Medical College of Georgia, and DON SNELL, individually and in his official capacity as President and CEO, MCG Health, Inc., Defendants.

ORDER

The captioned case was transferred to this Court from the United States District Court for the Northern District of Georgia on July 6, 2005. Plaintiff Kwabena Mawulawde, a former employee of the Medical College of Georgia ("MCG"), has sued Defendants MCG Health, Inc. and Don Snell "Private Defendants") and Defendants Board of Regents of the University System of Georgia, Daniel Rahn, M.D., and David Stern, M.D. ("State Defendants") for various claims including race discrimination in employment under Title VII of the 1964 Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e - 2000e-17. Currently before the Court are seven separate motions, including two motions for summary judgment. Each motion will be addressed separately

below.

I. Preliminary Motions

A. Plaintiff's Motions to Extend Discovery

Discovery in the instant case has been long and arduous. Under this Court's initial Scheduling order, all discovery was to close by December 23, 2005.(Doc. no. 8.) On November 30, 2005, the Court granted Plaintiff an additional two months of discovery. (Doc. no. 59 at 6.) on February 17, 2006, Plaintiff filed a motion to compel and a second motion to extend time for discovery.(Doc. no. 77.) The Court allowed discovery to reopen on May 1, 2006 for two months.(Doc. no. 105.) However, the parties jointly requested discovery be stayed until they could settle a number of discovery disputes. (Doc. no. 110.) Discovery remained stayed until January 8, 2007.(Doc. no. 142.) On February 7, 2007, Defendants moved for a limited extension of discovery until March 2007. (Doc. no. 149.) Plaintiff responded by requesting an unlimited extension of discovery. (Doc. no. 161.) The Court ordered that discovery be extended until March 9, 2007 for the limited purpose of allowing Plaintiff to take a second deposition of witness Kevin Landolfo, M.D. (Doc. no. 166.) Plaintiff did not take this deposition and instead, the day before discovery was set to close, moved for an indefinite extension of the discovery period. (Doc. no. 172.) The Court denied this motion and discovery was closed on March 9, 2007. (Doc. no. 182.)

After the parties had completed all briefing on Defendants' Motions for Summary Judgment, the Eleventh Circuit issued an opinion "declining to

recognize a privilege for documents relating to medical peer review proceedings in federal discrimination cases." Adkins v. Christie, 488 F.3d 1324, 1326 (11th Cir. 2007). The Court directed the parties to brief the impact of the Adkins decision on discovery in this case. (Doc. no. 217.) Plaintiff then requested that discovery be reopened for an unlimited time and unlimited purpose. (Doc. no. 238 at 12, 17.)

In an Order dated August 24, 2007, this Court summarized the course of discovery in this case, noting that in the initial discovery period, Plaintiff committed several discovery abuses including deliberately disobeying this Court's instructions on the number of interrogatories he could serve, attempting to renege on the parties' agreement regarding the scope of discovery, and failing to pursue discovery in a timely manner. (Doc. no. 245 at 7, 12-13.) This Court refused to allow Plaintiff a "discovery do-over." (Id. at 11.) However, in consideration of Adkins, the Court did allow Plaintiff to seek limited peer review material and to reconvene or take new depositions to pursue previously foreclosed peer review material. (Id. at 20.) Plaintiff was allowed sixty days, until October 24, 2007, to complete these inquiries. (Id.) The State Defendants provided 1600 pages of morbidity and mortality documents subject to the peer review privilege to Plaintiff on September 25, 2007. (Doc. no. 285 at 3.)

This Court stayed the case on October 26, 2007 because the Adkins appellants petitioned the United States Supreme Court for certiorari. The stay in this case was lifted on February 7, 2008 after the Supreme Court denied certiorari in Adkins. (Doc. no. 266.) The parties were then granted another sixty days, until April 7,

2008, to complete discovery of peer review material. (Doc. no. 266 at 2.) The Private Defendants allowed Plaintiff and his attorneys to review documents covered by peer review and medical review on February 18-20, 2008 and March 3-4, 2008. (Doc. no. 284 at 9.) Plaintiff flagged the documents he wished to have copied and Defendant MCG Health, Inc. photocopied and sent Plaintiff his selected documents: 9,176 pages of material relating to fifty-eight physicians. (Id. at 10.) The Private Defendants also produced 297 pages of material previously identified on their privilege logs before the original discovery period had closed. (Id.)

During this time period, however, Plaintiff did not schedule any depositions. Instead, he filed a motion to extend discovery and for modification of prior discovery orders. (Doc. no. 268.) on April 21, 2008, this Court granted Plaintiff an additional thirty days to complete the peer review discovery period. (Doc. no. 276.) The Plaintiff took six depositions from May 6-9, 2008. However, the parties disagreed about the scope and duration of the depositions of Don Snell and Kevin Landolfo, M.D.

On May 20, 2008, Plaintiff filed a Renewed Motion to Extend the Time for Discovery[1] (Doc. no. 278.) In this pending motion, Plaintiff argues that the Private Defendants "failed to supplement any of the requests for production of documents except for the production of credentialing files." (Doc. no. 278 Par. 9.) Plaintiff also argues that he needs more time to depose Snell and Dr. Landolfo and may need to re-depose others as well. (Id. Pars. 8, 10-11.) The Private Defendants respond that they have produced both quality and credentialing files to Plaintiff, that Plaintiff had the opportunity to

review both types of files, and that Plaintiff selected a number of quality documents for photocopying and production by the Private Defendants. (Doc. no. 284 at 16-17.) As to the deposition of Snell, the Private Defendants respond that Federal Rule of Civil Procedure 30(d)(2) provides a seven-hour time limit to any deposition absent a court order or stipulation. In total, Plaintiff has already deposed Snell for over seven hours. The Private Defendants agreed to make Snell available for an additional two hours on either May 7th or 8th, but the Plaintiff did not take this opportunity. (Id. at 17-18.)

Dr. Landolfo was deposed by Plaintiff during the original discovery period for nearly five hours. (Doc. no. 285 at 4.) Plaintiff was limited in his questioning of Dr. Landolfo by requirements of the Health Insurance Portability and Accountability Act of 1986 ("HIPAA"). Once the parties entered a HIPPA compliant Consent Protective Order, the Court granted Plaintiff the opportunity to redepose Dr. Landolfo. (Id.) However, the Court limited the scope to questions not answered during the first deposition on the basis of HIPAA and limited the time to the remaining two hours and fifteen minutes of the seven hour time limit imposed by Rule 30(d)(2). (Id.) Although Dr. Landolfo was made available, Plaintiff did not re-depose Dr. Landolfo and instead moved the Court for an unlimited extension of discovery. (Id.; Doc. no. 172.)

During the peer review discovery period, Plaintiff initially did not schedule depositions. However, after he was granted the additional thirty days for the peer review discovery, Plaintiff elected to continue his deposition of Dr. Landolfo. On May 8, 2008, Plaintiff

deposed Dr. Landolfo for nearly an hour and a half. (See Cont'd Landolfo Dep.) Plaintiff began the deposition an hour and forty minutes late and during the deposition, exceeded the scope of the limited peer review discovery[2] (Doc. no. 285 at 5; Exs. C & D.)

In consideration of Plaintiff's discovery motions, the Court finds Plaintiff has not been diligent in seeking discovery and that Defendants have complied with their discovery obligations. Under this Court's Order of August 24, 2007, the post-Adkins discovery period was intended to be very limited in scope. (See doc. no. 245.) Even still, this Court generously gave the Plaintiff an additional thirty days for this limited discovery period. (See doc. no. 276.) The Federal Rules do not intend for discovery to be limitless. Under Rule 16(b) the Court must provide a scheduling order which cannot be modified without a showing of good cause. When the party seeking to extend discovery has not been diligent, the good cause inquiry should end. Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1418 (11th Cir. 1998) (citing Johnson v. Mammoth Recreations, Inc., 975 F. 2d 604, 609 (9th Cir. 1992)) . Under Local Rule 26(d) (i) for this district, parties in civil suits generally have 140 days to complete discovery. Here, Plaintiff had over eleven months of discovery in the original discovery period and over 150 days to complete the additional post-Adkins peer review discovery. Further, Plaintiff attempted to exceed the scope of the post-Adkins review period by questioning Dr. Landolfo and Snell on matters unrelated to peer review. Finally, Plaintiff has received peer review discovery from both the State Defendants and the Private Defendants and has had more than enough time to review this discovery. To allow Plaintiff any more time would result in additional

costs and waste of judicial resources and moreover, would unduly prejudice Defendants. Therefore, Plaintiff's motions to extend discovery are DENIED. (Docs. no. 278, 296.)

B. Plaintiff's Motion to Reconvene Depositions

Incredibly, on July 18, 2008, Plaintiff filed yet another motion to extend discovery, this time in the form of a Motion to Reconvene Depositions (Doc. no. 317.) Plaintiff moves to reconvene the depositions of Dr. Landolfo, Snell, Barry Goldstein, Thomas Gadacz, David Stern, and Mark Anstadt.[3] In his motion, Plaintiff presents no argument or case law related to reconvening depositions. Instead, Plaintiff argues that he should be able to seek discovery from the Medical College of Georgia, a party dismissed from this case on November 30, 2005. (See doc. no. 60.) Plaintiff states he needs additional time to complete discovery "as well as modification of prior discovery orders that will allow him to seek such discovery without limitations beyond relevance." (Doc. no. 317 at 10.) Specifically, Plaintiff asks this Court to reconsider its order of August 24, 2007, in which this Court denied Plaintiff's request to reopen discovery except for a limited peer review discovery period necessitated by Adkins. (Doc. no. 245.) In that lengthy order, the Court examined the tortuous procedural history of this case and fully considered Plaintiff's arguments for reopening discovery. This Court concluded that it would not "reopen discovery at this late date simply to indulge Plaintiff's speculative arguments, particularly in light of the Plaintiff's complete failure to pursue such discovery during the lengthy discovery period afforded the parties in this case." (Doc. no. 245 at 16.) This Court finds no reason to

disturb this holding. As noted above, Plaintiff has had ample opportunity to conduct discovery in this case, both during original discovery and during the post-Adkins peer review discovery period. Plaintiff presents no compelling reason for this Court to grant him yet another discovery period, unlimited in scope. Indeed, Plaintiff merely rehashes arguments already fully considered and rejected by this Court. Simply put, enough is enough. Plaintiff's Motion to Reconvene Depositions is DENIED. (Doc. no. 317.)

C. Plaintiff's Motion to File a Second Amended Complaint

On June 6, 2008, Plaintiff filed a Motion for Leave to File a Second Amended Complaint (Doc. no. 282.) Plaintiff seeks to add a breach of contract claim and a claim under 42 U.S.C. § 1981. Plaintiff argues he should be allowed to amend his complaint a second time because of additional facts learned during discovery, because generally plaintiffs should be given at least one chance to amend their complaints, and because the claims he seeks to add are "no different from those being asserted in the original complaint." (Doc. no. 283 at 2.)

Both the Private Defendants and State Defendants respond that Plaintiff has unduly delayed in seeking leave to amend, that Plaintiff has failed to show good cause for leave to amend, and that Defendants will be unduly prejudiced should the Court grant Plaintiff's request. The Court agrees. First, Plaintiff files this motion nearly four years after the commencement of the lawsuit and thirty-two months after the deadline to add or amend pleadings. The parties have already

endured an extensive discovery period which included several extensions and two stays. Plaintiff's request comes fifteen months after discovery originally closed and two weeks after the close of the limited discovery period required by Adkins. The Eleventh Circuit has held that a district court does not abuse its discretion when it denies a leave to amend after the close of discovery and past the deadlines for amendments and filing of dispositive motions. Lowe's Home Ctrs, Inc. v. Olin C or ., 313 F.3d 1307, 1315 (11th Cir. 2002) (citing Hinson v. Clinch County, Georgia Bd. Of Educ., 231 F. 3d 821 (11th Cir. 2000)).

Second, Plaintiff himself states that the claims he seeks to add are no different than the claims already included in his complaint. Despite this acknowledgement, Plaintiff fails to offer any explanation as to why he could not have included a breach of contract claim and a § 1981 claim in his original complaint.

Third, the Court finds Defendants would be unduly prejudiced if Plaintiff were allowed to amend his complaint at this stage of the proceedings. If Plaintiff was allowed to amend his complaint, additional discovery and briefing would be required. Additionally, Defendants have already fully briefed their motions for summary judgment, listing defenses against Plaintiff's claims. Defendants would be unduly prejudiced if Plaintiff was allowed to amend his complaint to correct flaws in the complaint identified by Defendants. A district court does not abuse its discretion in denying a motion for leave to amend when that motion is designed to avoid an impending summary judgment. Lowes, 313 F. 3d at 1315 (citing Local 472 of United Ass n of Journeymen & Apprentices of Plumbing & Pipefitting

Indus. v. Georgia Power Co., 684 F.2d 721, 724 (11th Cir. 1982)).

Finally, the Court notes that Plaintiff has already been given one opportunity to amend his complaint and could have included these two additional claims at that time. Therefore, Plaintiff's Motion for Leave to Amend is DENIED. (Doc. no. 282.)

D. Motion to Seal Documents

The Private Defendants have filed a motion to seal Plaintiff's Proposed Second Amended Complaint. (Doc. no. 300.) Although Plaintiff opposes this motion, the Court finds that the Second Amended Complaint contains direct quotes from documents designated as peer review material and produced by the Private Defendants during the peerreview discovery period. This Court's Order of February 7, 2008 states that any documents designated by any person in good faith as confidential, shall be marked confidential. (Doc. no. 267 Par. 3.) The order specifically states it applies to all documents and products of discovery that contain peer review material. (Id. Par. 2a.) Therefore, Defendants' Motion to Seal Plaintiff's Proposed Second Amended Complaint is GRANTED.[4] (Doc. no. 300.)

II. Defendants' Motions for Summary Judgment

The Private Defendants and the State Defendants have each filed Motions for Summary Judgment (Docs. no. 183, 193.

A. Factual Background

Plaintiff, a cardiothoracic surgeon, brings this suit against his former employer, the Board of Regents ("BOR") of the Medical College of Georgia ("MCG"), alleging that the BOR and the other Defendants discriminated against him because he is black and of Jamaican descent. Plaintiff held a part-time academic appointment as a cardiothoracic surgeon at MCG from August 1, 2000 to December 31, 2003. (Doc. no. 197 Par. 2.) In his original Complaint, Plaintiff lists six counts: a 42 U.S.C. § 1983 ("§ 1983") due process claim, a due process claim under § 1983 of the Georgia Constitution, a claim for conspiracy under 42 U.S.C. § 1985(3) "§ 1985"), a claim under 42 U.S.C. § 2000(d) et seq ("Title VI"), a Title VII claim, and a claim for attorney's fees.[5]

Plaintiff's allegations concern various events spanning the course of his employment with MCG. However, as is discussed more fully below, all of Plaintiff's claims are subject to a two-year statute of limitations. Plaintiff filed his original Complaint on September 2, 2002. (Doc. no. 1.) Therefore, any claims regarding events taking place prior to September 2, 2002 are time barred and will not be considered by this Court.

i. Background of the Cardiothoracic Surgery Section at MCG

The Cardiothoracic Surgery Section at MCG has had a tumultuous history. (Doc. no. 197 Par. 13.) In 1997, Dr. George Lionel Zumbro was hired by the BOR to be Chief of the Cardiothoracic Surgery Section. (Id. Par. 12.) The previous Chief had been fired and the section was in "virtual anarchy." (Id. Pars. 14-15.) In the field of cardiac surgery, good team interaction is critical and the Chief must be able to work well with the surgeons

underneath him. (Id. Pars. 31-32.) According to Dr. Daniel Rahn, President of MCG during the relevant time period, it is typical for faculty recruited into leadership positions to request discretion to hire their own team. (Rahn Aff. Par. 14.) After assuming the position of Chief, Dr. Zumbro hired four individuals, including Dr. Mark Anstadt and Plaintiff, to work under him. (Doc. no. 197 Pars. 30, 34.) Dr. Anstadt, who is white, was a surgeon Dr. Zumbro had known prior to becoming Chief. (Id. Pars. 34, 36.) Dr. Zumbro also had a personal connection to Plaintiff and had first hired Plaintiff to work at his private surgical practice from August 1999 until the practice closed in July 2001. (Id. Pars. 41-42.) Plaintiff began working for Dr. Zumbro as a non-tenure track, part-time faculty member at MCG on August 1, 2000. (Id. Par. 40; Pl.'s Dep. at 96.) Also working in the cardiothoracic surgery section at the time was Dr. Victor Moore, a pediatric surgeon who was close to retirement. (Zumbro Dep. at 15; Gadacz Dep. at 49.)

The cardiothoracic surgery department's residency program had been put on probation by the Residency Review Committee (PRC) of the Accreditation Council for Graduate Medical Education because of turmoil in the section. (Gadacz Dep. at 47.) One of Dr. Zumbro's main tasks as Chief was to obtain removal of the residency program's probationary status. (Id. at 47-49.) The program was under tight scrutiny because MCG wanted to preserve the program but was aware that the program would be lost if they were given an unfavorable review during the RRC's next visit. (Anstadt Dep. at 21.) Dr. Zumbro vested a good deal of the administrative responsibilities for the program in Dr. Anstadt, who was eventually appointed program

director. (Id. at 21-22.) Dr. Anstadt testified that "[Plaintiff] was integral to the training program. He trained residents on the floor, in the wards, and in the conferences." (Id. at 22.) In 2002, the residency program was taken off probation. (Zumbro Dep. at 40.)

ii. Plaintiff's Background, Experience at MCG, and Reputation

Prior to joining MCG, Plaintiff worked for two years as Chief of Cardiac Surgery at the V.A. Medical Center in Little Rock, Arkansas. (Pl.'s Dep. at 18.) He also served as the Director of Thoracic Organ Transplantation and Assistant Professor of Surgery at the University of Arkansas. (Id. at 19.) Plaintiff then completed a National Institute of Health ("NIH") fellowship at Transplantation Biology Research Center at Massachusetts General at Harvard Medical School. (Pl.'s Decl. Par. 3.)

Dr. Zumbro wanted to start a transplantation program at MCG and was interested in Plaintiff because of his background and training at Harvard. (Zumbro Dep. at 25.) In 1999, Plaintiff gave a formal lecture at MCG on his recently completed research at Harvard. (Pl.'s Decl. Par. 5.) However, MCG was not ready to begin a transplantation program at that time. (Zumbro Dep. at 26.) still interested in bringing Plaintiff to Augusta and eventually to MCG, Dr. Zumbro instead invited Plaintiff to join his private practice in Augusta. (Id.)

Plaintiff believes there were objections to him joining the staff at MCG from the beginning. (Pl.'s Dep. at 36.) Plaintiff felt that his interviewers had a cold attitude and were less than professional toward him. (Id. at

31.) Both Dr. Zumbro and his office manager testified that Dr. Victor Moore, a pediatric cardiothoracic surgeon, objected to Plaintiff coming to MCG because Plaintiff is black. (Zumbro Dep. at 121; Clark Dep. at 22.) However, Plaintiff did have the support of Dr. Zumbro and Tom Allgood, a member of the Board of Regents. (Pl.'s Dep. at 35.) According to Plaintiff, Dr. Zumbro and Allgood thought hiring Plaintiff would help change the racial attitude of people in Augusta. (Id. at 33.)

In June 2000, Plaintiff was appointed as an Assistant Professor in the Department of Cardiothoracic Surgery, effective August 1, 2000. (Id. Ex. 3.) This appointment was on a .8 time scale, meaning 80% of his time was committed to MCG. (Id. at 44.) In addition to this position, from August of 2000, Plaintiff was serving as Chief of Cardiothoracic Surgery at the VA Medical Center which maintains a close relationship with MCG. (Howell Dep. Ex. 12 at 3.) Although Plaintiff wanted to be full time, for the 2001-2002 school year, his time was increased only to .95. (Pl.'s Dep. Ex. 7.) Dr. Zumbro states that he and Dr. Gadacz considered Plaintiff a full time employee. (Zumbro Dep. at 136-37.) Even though Plaintiff's time commitment to MCG was increased, he never received a salary increase. (Pl.'s Dep. at 67.) Plaintiff received letters in the summers of 2002 and 2003 informing him that he would be reappointed to the same position for the following school years. (Id. Exs. 8, 9.)

By all accounts, Plaintiff had a good reputation at MCG for his surgical abilities. Dr. Zumbro, who has forty years of experience in surgery, testified that he would rate Plaintiff's knowledge, skill, and abilities as

excellent. (Zumbro Dep. at 108.) In fact, Dr. Zumbro stated that if he needed heart surgery, he would like for Plaintiff to perform the surgery. (Id. at 109.) Dr. Zumbro also stated that the residents liked Plaintiff. (Id. at 48.) Dr. Thomas Gadacz, the then Chairman of the Department of Surgery, stated that Plaintiff was a very technically competent surgeon who handled complex cases and got good results. (Gadacz Dep. at 72.) Dr. Gadacz also commended Plaintiff for establishing a referral program with the Columbia, SC VA Hospital which resulted in more clinical experience for residents at MCG. (Id. at 52.) Dr. Charles Howell, a pediatric surgeon at MCG, stated that the general opinion around MCG was that Plaintiff was a good or even excellent surgeon. (Howell Dep. at 55.) Furthermore, in the area of heart surgery, Plaintiff was considered to be better than Dr. Anstadt. (Id.)

According to Plaintiff and Dr. Zumbro, Dr. Anstadt often required Plaintiff's help on heart surgeries. (Zumbro Dep. at 41; Pl.'s Dep. at 68.) Dr. Anstadt admits that Plaintiff had more experience and training than he did. (Anstadt Dep. at 136.) Plaintiff states that even though he was frequently called in to help Dr. Anstadt, Dr. Anstadt was being paid more than he was. (Pl.'s Dep. at 68.)

Plaintiff also complains that he was denied research opportunities while at MCG. (Id. at 66-67.) MCG supported Dr. Anstadt's research by providing him with funding. (Anstadt Dep. at 240.) Dr. Anstadt also remembers Plaintiff talking to him about the research he was interested in doing. (Id.) However, when Plaintiff asked Dr. Gadacz and another researcher to help facilitate his efforts to begin research, they just

ignored him. (Pl.'s Dep. at 66-67.) Dr. Zumbro confirms that Plaintiff expressed an interest in doing research, but did not receive any support from Dr. Gadacz. (Zumbro Dep. at 31-32.) According to Dr. Zumbro, there was no lab space at MCG for Plaintiff to set up his experiments. (Id. at 31-32.) Although Defendants contend that Plaintiff had no experience in applying for grants, Plaintiff states that without lab space, personnel, equipment, and animal storage space and costs, it is practically impossible to perform the necessary preliminary work to apply for outside grants. (Pl.'s Decl. Par. 11.)

Defendants point out that in addition to Plaintiff's reputation as being a good surgeon, he also had a reputation for having a bad temper. Dr. Gadacz recalls one incident where Plaintiff screamed at a nurse in the operating room because she had not provided the correct instruments. (Gadacz Dep. at 160.) Defendants also cite an incident where Plaintiff became upset because one of his surgeries was cancelled, and he threatened to blow up the operating room. (Doc. no. 186 Par. 79.) This incident was investigated and, according to Plaintiff, the complaint was found to be groundless. (Doc. no. 212 Par. 80.) Dr. Zumbro also admits that people had a perception that Plaintiff had a bad temper and that he had received complaints from at least one nurse. (Zumbro Dep. at 46, 95.) However, Dr. Zumbro states that Plaintiff's behavior was not unusual for a surgeon. (Id. at 47.) Dr. Zumbro's office manager and residency program coordinator, Debra Clark, also testified that Plaintiff's temper was no worse than that of many other surgeons she had worked with and that Plaintiff was never sent to anger management classes even though other MCG surgeons were. (Clark Dep. at

47, 49.)

iii. The Search for a New Chief

On October 15, 2001, Dr. Zumbro notified MCG that he would be stepping down as Chief, effective June 30, 2002. (Zumbro Dep. at 67.) Plaintiff told Dr. Zumbro that he wanted to apply for the position of Chief and Dr. Zumbro thought that Plaintiff was qualified. (Id. at 138.) Dr. Anstadt did not want to be Chief and did not apply for the position, but was appointed Interim Chief; serving from some point in 2002 until the new Chief arrived in the summer of 2003. (Anstadt Dep. at 28, 175.)

The search for the new Chief began near the end of 2001, when Dr. Gadacz appointed Dr. Howell to be the chairman of the search committee. (Howell Dep. at 52.) Dr. Howell believes he received the appointment because he had been very vocal about the program's need of a pediatric heart surgeon since Dr. Moore was about to retire. (Id. at 51.) The committee included Dr. Anstadt and other people suggested by Dr. Howell, Dr. Gadacz, and the Dean of MCG. (Id. at 53.)

Plaintiff applied for the position of Chief by sending a letter of intent and his CV to Dr. Gadacz who forwarded this information to Dr. Howell. (Pl.'s Dep. at 150.) Plaintiff also spoke with Dr. Gadacz about his interest in the position. (Id. at 117-18.) Plaintiff believed he was extremely qualified for the position due to his previous service as Chief of Cardiothoracic Surgery at the VA hospital in Arkansas and Chief of Cardiothoracic Surgery at the Augusta VA Hospital. (Id. at 150-51.) Plaintiff also mentions that he attended a course for physicians at the Harvard School of Public

Health entitled "Leadership Development for Physicians in an Academic Medical Center." (Id. at 151.) This was a course intended for doctors who were or were likely to become chairmen or chiefs of sections or departments. (Id.} Dr. Gadacz informed Plaintiff that the committee was looking for someone with pediatric cardiac experience, a qualification which would preclude Plaintiff. (Id. at 117-18.) However, the search committee initially considered hiring for two positions, a Chief of Cardiothoracic Surgery and a second opening for a pediatric cardiothoracic surgeon. (Howell Dep. Ex 2.)

Among the first candidates the committee considered were Dr. Diehl, Dr. Merrill, and Dr. Yeh. (Id. Ex. 9.) Dr. Diehl and Dr. Merrill were both primarily adult cardiothoracic surgeons and were only being considered for the position of Chief. (Id. Ex. 5.) Dr. Yeh had pediatric experience and was interviewing for both positions. (Id. Ex. 9.) In an email to the committee dated March 4, 2002, Dr. Howell mentions that Plaintiff was the next person on the list to interview. (Id.) Before the end of March 2002, Dr. Merrill decided to take a position elsewhere. (Id. Ex. 13.) Dr. Howell tried to work out a deal with Dr. Yeh, but at some point after June of 2002, Dr. Yeh declined to come to MCG. (Id. at 183.) Ultimately, Dr. Diehl also declined to come to MCG. (Id. at 180.)

Although the committee had received Plaintiff's CV as early as March 4, 2002, his interview was not scheduled until May 9-10, 2002. (Id. Ex. 12, Ex. 17.) Dr. Howell states the committee was interested in an external candidate, not an internal candidate, because most committee members were not happy with the way

things had been going in the cardiothoracic surgery department. (Howell Dep. at 140.) The committee was aware that the department had been losing money and had been getting fewer referrals. (Id. at 140.) Dr. Howell also states that the committee was concerned that Plaintiff had not received grants before and had not been senior author on many articles. (Id. at 152.) However, Dr. Howell states that the main reason the committee did not want Plaintiff to be Chief was that they did not want an internal candidate. (Id. at 155.)

According to Dr. Gadacz and Dr. Zumbro, Plaintiff was not given the benefit of a full or fair interview. (Gadacz Dep. at 133; Zumbro Dep. at 119.) Dr. Zumbro also testified that he thought that the committee was not even going to give Plaintiff an interview until he pointed out to Dr. Gadacz that in fairness they should interview Plaintiff or it would not look good politically. (Zumbro Dep. at 139.) Dr. Zumbro referred to the interview as "a joke" because Plaintiff only met with a few people and was not taken out to dinner or taken around and introduced to people in the manner afforded the other candidates. (Id. at 139-40.) Plaintiff recalls being interviewed by several individuals, including Dr. Rahn, Dr. Stern, Snell, Dr. Howell, and Dr. Gadacz. (Pl.'s Dep. at 230.) Snell testified that he did not even ask Dr. Zumbro or Dr. Gadacz about Plaintiff's knowledge, skill, and ability. (Snell Dep. at 160-61.) Additionally, Plaintiff states he was never informed that he would not be offered the position of Chief. (Pl.'s Dep. at 231.)

In April 2002, Dr. David Mark Stern became Dean of MCG. (Stern Dep. 30.) At that time, the search committee headed by Dr. Howell was reorganized so

that Dr. Howell was no longer the chairman. (Howell Dep. at 169, Ex. 14.) The new committee was termed the Cardiovascular Leadership Search Committee and was charged with hiring "for the positions of Section Chief in Adult Cardiology, Adult Cardiothoracic Surgery, and Pediatric Cardiac Surgery." (Id. Ex. 14.) Dr. Gadacz stated that at this time he was taken out of the loop as the committee was to report directly to Dr. Stern. (Gadacz Dep. at 104.) In June 2002, Dr. Stern offered to Plaintiff and Dr. Anstadt the positions of co-chiefs of cardiothoracic surgery.[6] (Pl.'s Dep. at 108; Anstadt Dep. at 174; Gadacz Dep. at 132.) Plaintiff turned down the offer because he had issues with Dr. Anstadt's competency as a surgeon and was angry the offer was being made to Dr. Anstadt even though Dr. Anstadt never applied for the position. (Pl.'s Dep. at 73.) Dr. Anstadt also thought this was a bad idea and turned down the offer. (Anstadt Dep. at 176.)

Dr. Anstadt took military leave in March 2003 for around ninety days. (Gadacz Dep. at 79; Anstadt Dep. at 29.) During this period, from around mid-March until midJune 2003, Plaintiff was promoted to Interim Chief and Program Director. (Pl.'s Dep. at 74; Anstadt Dep. at 172.) Plaintiff states he worked around the clock, seven days a week, training residents and taking care of patients at MCG and at the VA and was never compensated for this extra work. (Id.) Dr. Gadacz confirms that Plaintiff readily assumed the responsibility and did a very good job in the position. (Gadacz Dep. at 80.) Despite his performance, Plaintiff received no financial or other type of recognition for his additional work, aside from "a lot of thanks" from Dr. Gadacz. (Id. at 80-81.) Plaintiff states that his salary never equaled the salary received by Dr. Anstadt when

he served in the same position. (Pl.'s Dep. at 74.) In fact, in May of 2003, Plaintiff received a letter from Dr. Gadacz stating that Plaintiff's salary for the following year would be reduced by $10,000 due to the need to use that money for the recruitment of Dr. Landolfo . (Id. Ex. 51.)

Dr. Kevin Landolfo was a cardiothoracic surgeon at Duke who came to the attention of the new search committee through word of mouth. (Howell Dep. at 197.) Dr. Stern found him impressive because he was an assistant professor with tenure at a school known for having a top rated cardiothoracic surgery program. (Stern Aff. Par. 54.) Dr. Landolfo was also Co-Director of the Duke Therapeutic Angiogenesis Research Center and the Director of the CARES: Minimally Invasive and Robotic Cardiac Surgery at Duke. (Id. Par. 57.) Furthermore, Dr. Landolfo's CV demonstrated that he was involved in significant research on cutting edge technology, he had experience obtaining peer reviewed grant support, and he was listed as the lead researcher on several publications. (Id. Pars. 56, 58-59.)

Dr. Landolfo first met with Dr. Stern in December 2002 at Duke and visited MCG twice in January 2003. (Landolfo Dep. at 128-30.) He met with several people on his visit including Dr. Stern, Dr. Rahn, and at least twice with Snell. (Id. at 129-30.) In between his first and second visit, Dr. Landolfo was asked to create a five-year plan for the cardiothoracic surgery department. (Id. at 132.) Dr. Landolfo was not provided with any data, other than billing and collection data, with which to help formulate this plan. (Id. at 132, 134.) After submitting this plan, Dr. Landolfo began a

negotiation process with MCG. (Id. at 135.) Through the course of negotiations, Dr. Landolfo was able to be more specific about what he wanted as far as salary, office, and faculty. (Id.) Included in this negotiation process were different leaders from the Medical College, including Dr. Rahn and Dr. Stern, as well as people from MCG Health, mainly Snell. (Id. at 136.) Although Dr. Landolfo did not frequently communicate directly with Snell, he knew from Dr. Stern and Dr. Gadacz what Snell wanted and knew that Snell was "the financial arbiter of hospital resources" and thus critical to Dr. Landolfo' s plan and negotiations. (Id. at 137-38.) After negotiating an acceptable deal, Dr. Landolfo accepted the position in March 2003 and began work in July of that year. (Id. at 140, 160.) According to Dr. Gadacz, Dr. Landolfo came in with a salary that was considerably more than Dr. Zumbro had been paid as Chief. (Gadacz Dep. at 137-38.)

As part of his five-year plan and negotiations, Dr. Landolfo requested that MCG fire Dr. Anstadt and Plaintiff. (Landolfo Dep. at 153.) Dr. Landolfo states that he wanted to bring in his own staff with specific skill sets. (Id.) Prior to accepting the position, Dr. Landolfo had met Plaintiff only once. (Id. at 142.) However, Dr. Landolfo had known Dr. Anstadt when Dr. Anstadt was a resident at Duke. (Id. at 149.) Dr. Gadacz testified that he was aware of tension between Dr. Landolfo and Dr. Anstadt. (Gadacz Dep. at 111.) In fact, Dr. Landolfo stated that he did not think Dr. Anstadt was a good cardiac surgeon. (Id.) In regard to Plaintiff, Dr. Landolfo testified that even though he did not know about Plaintiff's surgical skill set per se, he knew what kind of surgery he was doing and knew Plaintiff had not completed additional fellowship

training in the areas Dr. Landolfo thought were critical. (Landolfo Dep. at 155-56.) However, according to a memo sent by MCG legal counsel Sol Walker to Dr. Stern, Dr. Landolf o decided to fire Dr. Anstadt and Plaintiff because he "believed that their research and clinical skills were not at an acceptable level." (Stern Dep. at 256.) Dr. Landolfo states that he knew all of the surgeons he was hiring, had research experience with each of the surgeons, and each had a specific skill set in either congenital heart surgery, cardiac transplant and devices, or general thoracic surgery.[7] (Landolfo Dep. at 157.) Dr. Landolfo also states he believed an entire new staff was needed in the section because the general consensus was that things in the section were not going well. (Id. at 158.)

Plaintiff was notified in August 2003 that he would be terminated on December 31, 2003 because Dr. Landolfo wanted to bring in his own people. (Pl's Dep. Ex. 40.) Dr. Anstadt was notified in June 2003 that he was not going to be part of the plan after Dr. Landolfo arrived, but that he would be allowed to finish the academic year. (Anstadt Dep. at 44-45.) Shortly after Dr. Landolfo arrived, Dr. Anstadt and Plaintiff were taken off the call schedule, meaning that they were no longer assigned patients. (Id. at 53; Pl.'s Dep. at 132.) In addition, Plaintiff states that Dr. Landolfo told the secretaries that any physicians calling from outside the community to refer patients to Plaintiff should speak to Dr. Landolfo first. (Pl.'s Dep. at 132.)

iv. The Cardiothoracic Surgery Section under Dr. Landolofo

Plaintiff remained at MCG until December 2003,

approximately six months after Dr. Landolfo arrived. (Pl.'s Dep. at 131.) During that time, Plaintiff observed that Dr. Landolfo's patients took longer to recover and remained in the hospital longer than the average expectancy. (Id. at 129-30.) Plaintiff also testified that Dr. Landolfo's patients' rates of infection and complication were higher than he had ever seen at MCG. (Id. at 128, 131.

Plaintiff also complains that he was moved from a private office to a shared office space. (Id. at 131. The area where their offices had been located was being renovated and so Plaintiff, Dr. Anstadt, a couple of secretaries and two nurses were moved into an old classroom with old furniture without any compartmentalization or privacy. (Id. at 131-32.) They remained in this space for about three or four months, sometime during the time period of July to December 2003. (Id. at 133.) After the renovations were completed, Plaintiff was moved to a private office but it was not as big as his previous office and was in the non-renovated portion of the building. Dr. Landolfo was moved to the newly renovated area. (Id. at 140-41.) Dr. Anstadt was also moved to an office in the older, non-renovated portion of the building. (Anstadt Dep. at 51.)

In April 2005, the RRC came to MCG to perform a site review. (Landolfo Dep. at 159.) In August of that year, the RRC made the decision to withdraw accreditation for the cardiothoracic surgery residency program. (Id.) Dr. Howell testified that he was shocked that MCG had lost the program because he thought that Dr. Anstadt had worked so hard to keep it and everything appeared to be in order when he was there. (Howell Dep. at 203.) From Dr. Howell's perspective, the loss of the program

caused MCG to lose stature within the academic community. (Id. at 202-03.)

B. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues of fact and the movant is entitled to summary judgment as a matter of law. See Fed. R. Civ. P. 56(c). The purpose of the summary judgment rule is to dispose of unsupported claims or defenses which, as a matter of law, raise no genuine issues of material fact suitable for trial. Celotex Corp. v. Catrett, 477 U.S. [illegible], 322-23 (1986).

In considering a motion for summary judgment, all facts and reasonable inferences are to be construed in favor of the non moving party. Hogan v. Allstate Ins. Co., 361 F.3d 621, 625 (11th Cir. 2004). The party opposed to the summary judgment motion, however, "may not rest upon the mere allegations or denials in its pleadings. Rather, its responses . . . must set forth specific facts showing that there is a genuine issue for trial." Walker v. Darby, 911 F.2d 1573, 1576-77 (11th Cir. 1990). Summary judgment is not appropriate ". . . if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In response to Defendants' motions for summary judgment, the Clerk issued Griffith[8] notices on April 9, 2007. (Docs. no. 184, 194.)

C. Plaintiff's Due Process Claims[9]

Plaintiff brings a claim for denial of procedural due process under 42 U.S.C. § 1983 and under the

Constitution of the State of Georgia. In Georgia, federal § 1983 claims must be brought within two years from when the right of action accrues. Williams v. City of Atlanta, 794 F.2d 624, 626 (11th Cir. 1986). Plaintiff's state law claim is also subject to a two year statute of limitations. O. C. G. A. § 9-3-33. The Georgia Supreme Court has interpreted due process claims under the State Constitution as providing the same procedural rights as the federal due process clause. Camden County v. Haddock, 523 S.E.2d 291, 292 (Ga. 1999). Thus, the Court's analysis for each claim is the same. In public employment cases, to satisfy the requirements of procedural due process, an employer must provide notice and an opportunity to be heard before denying the employee a property interest. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Therefore, in order to state a procedural due process claim, a plaintiff must show (1) he had a protected property interest in continued employment and (2) he was denied sufficient process related to a deprivation of that property interest. Ross v. Clayton County, 173 F.3d 1305, 1307 (11th Cir. 1999) .

Here, the parties vigorously dispute whether the Plaintiff was an at-will employee with no protected property interest or an employee under contract with an expectation of continued employment who could only be terminated for cause. However, the Court need not decide this issue because the parties do not dispute the second prong; whether Plaintiff was denied sufficient process. Even if Plaintiff had a protected property right in his employment, Defendants did not have to provide him with elaborate pretermination proceedings. Cleveland, 470 U.S. at 545. He was entitled to notice and an explanation of the reasons for his termination

and the opportunity to respond. Id. at 546. Furthermore, an employee is not deprived of procedural due process "unless and until the State refuses to provide due process." Zinermon v. Burch, 494 U.S. 113, 126 (1990). Thus, a plaintiff only suffers a violation of his procedural due process rights when the state refuses to make available a means to remedy the deprivation. Cochran v. Collins, 253 F. Supp. 2d 1295, 1305 (N.D. Ga. 2003). As the Eleventh Circuit has held, "the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1953 arise." McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994).

Plaintiff was notified in August 2003 that his last day would be December 31, 2003. While it is unclear exactly how many meetings Plaintiff had regarding his termination, the record shows that he did at least have a discussion with Dr. Gadacz. (Pl.'s Dep. Ex. 14.) on December 15, 2003, Plaintiff, through his attorney, contacted the Chancellor of the BOR concerning Plaintiff's termination. (Id. Ex. 58.) Two days later, Plaintiff received a response from the Assistant Vice Chancellor advising him of the procedures he should follow in order to obtain review of his claims by the BOR. (Id. Ex. 59.) After receiving this letter, Plaintiff failed to pursue any grievance procedure with the BOR. Thus, because the State offered to provide due process, but Plaintiff did not fully pursue such process, Plaintiff's procedural due process claims against all Defendants must fail.

D. Plaintiff's § 1983 Equal Protection Claim and Title

VII Claim

The Court will discuss Plaintiff's § 1983 Equal Protection claims and Title VII claims under the same framework because "when section 1983 is used as a parallel remedy for violation . . . of Title VII, the elements of the two causes of action are the same." Underwood v. Perry County Comm'n, 431 F.3d 788, 793 (11th Cir. 2005) (quoting Hardin v. Stynchcomb, 691 F.2d 1364, 1369 n.6 (11th Cir. 1982)). As noted above, Plaintiff's § 1983 claims have a two year statute of limitations. Williams, 794 F.2d at 626. Although Plaintiff has alleged numerous claims, his only claims under § 1983 which are not time barred can be characterized as four separate actions: (1) failure to promote, (2) disparate treatment in terms of pay, (3) disparate treatment in terms of office space, and (4) wrongful termination.[10]

i. McDonnell Douglas Framework

Disparate treatment claims, such as those brought by Plaintiff, require proof of discriminatory intent through either direct or circumstantial evidence. Denney v. City of Albany, 247 F.3d 1172, 1182-83 (11th Cir. 2001). When a plaintiff can only present circumstantial evidence of discrimination, a district court must utilize the McDonnell Douglas burden shifting framework to analyze the claim. Weston-Brown v. Bank of Am. Corp, 167 Fed. Appx. 76, 79 (11th Cir. 2006); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

In McDonnell Douglas., the United States Supreme Court established "the allocation of the burden of production and the order for the presentation of proof" in discrimination cases. St. Mary's Honor Ctr. v. Hicks,

509 U.S. 502, 502 1993). The McDonnell Douglas framework encompasses both a prima facie case and a burden-shifting scheme. This method of proof seeks to narrow a plaintiff's case to its most basic elements. Tex. Dept of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). The plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, a feather-weight burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the action in question. Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997). If the defendant carries its burden, the plaintiff resumes the burden of persuasion to show that the employer's proffered explanation was not the real reason for the employment change, but was instead a pretext for discrimination. Tex. Dep't of Cmty. Affairs, 450 U.S. at 256. The plaintiff, however, at all times carries the ultimate burden of proving by the preponderance of the evidence that the challenged employment decision was motivated by discriminatory animus. See id. at 252-53.

ii. Failure to Promote Claims

To meet his burden of establishing a prima facie claim for failure to promote, Plaintiff must prove that (1) he belonged to a protected class; (2) he was qualified for and applied for the position; (3) despite his qualifications, he was rejected; and (4) the position was filled by an individual outside the protected class. Vessels v. Atlanta Independent School System, 408 F.3d 763, 769 (11th Cir. 2005) (citing McDonnell Douglas., 411 U.S. at 802)).

a. Failure to Promote to Chief of Cardiothoracic

Surgery
The Court finds Plaintiff has met his burden of establishing a prima facie case. Defendants admit that Plaintiff applied for the position but argue that he was not qualified. Whether or not Plaintiff possessed all of the qualifications Defendants assert they were seeking, the fact that Plaintiff had served as Chief of Cardiothoracic Surgery at two other hospitals, served as Interim Chief at MCG, and was offered the position of Co-Chief at MCG demonstrates that Plaintiff was qualified to fill the position.

The burden now shifts to Defendants to articulate a legitimate nondiscriminatory reason. Defendants state that they hired Dr. Landolfo because he was more qualified. To win on this claim, Plaintiff now must show that this proffered reason is a pretext for discrimination. Pretext evidence is that which demonstrates "weaknesses, implausibilities, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could find them unworthy of credence." Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997). The Eleventh Circuit has explained that a defendant may make an employment decision for a "good reason, a bad reason . . . or no reason at all as long as its action is not for a [racially] discriminatory reason." See Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000) (quoting Nix v. WLCY Radio/Rahall Comme'n, 738 F.2d 1181, 1187 (11th Cir. 1984)). Furthermore, utilization of subjective factors is not improper. Denney, 247 F. 3d at 1185. In fact, subjective factors may legitimately play a substantial role in hiring for positions involving executive or managerial responsibilities. Id. Federal

courts are not required to act as a "super-personnel department" which reexamines an entity's business decisions. Id. at 1188. A employer is not required to hire the most qualified person for any particular position. Id.

This Circuit requires a "strong showing in disparity of qualifications" in order to show pretext. Id. at 1187. Plaintiff cannot show pretext by simply proving that he was better qualified than the individual who received the promotion over him. Id. Instead, the disparities in qualifications must be "so apparent as virtually to jump off the page and slap you in the face." Id. (citing Lee v. GTE Fla., Inc., 226 F.3d 1249, 1253-54 (11th Cir. 2000)).

Plaintiff offers five reasons why Defendants' explanation is pretextual: (1) "MCG was not seeking a pediatric cardiothoracic surgeon;" (2) "Plaintiff's alleged temper was a pretext for discrimination;" (3) "the statement [from the selection committee] that the internal candidates were not qualified was a pretext for discrimination;" (4) "the Defendants' statements that Plaintiff's research capabilities adversely affected his qualifications were a pretext for discrimination;" (5) "the loss of accreditation of the residency program shows the decision not to hire Plaintiff . . . was erroneous as a matter of fact and the reasons given therefor [sic] were a pretext for discrimination." (Doc. no. 210 at 50-57.)

None of these proffered reasons are sufficient to show pretext and in fact, several are supported by the evidence. First, the evidence shows that the committee was looking for a pediatric cardiothoracic surgeon, although they did not require that the same person be able to fill both the positions as pediatric cardiothoracic

surgeon and Chief of Cardiothoracic Surgery. Furthermore, even though Dr. Gadacz's statement that MCG was looking for a pediatric surgeon led Plaintiff to believe that he would not be hired, this did not prevent Plaintiff from applying or being interviewed for the position of Chief. And while Plaintiff has pointed to evidence that he did not receive the same type of extensive interview that other candidates received, the evidence shows that he did receive an interview and his own testimony states that he met with many of the people in positions of power, including Dr. Rahn, Dr. Stern, Snell, Dr. Howell, and Dr. Gadacz. Furthermore, Plaintiff was an internal candidate. It is not unreasonable or evidence of race discrimination that his interview was not as extensive as others, since, unlike the external candidates, Plaintiff would have already been familiar with many of the people at MCG and vice versa.

Second, it is not pretext that the committee considered Plaintiff's temper as there was some evidence provided to show his temper had raised concerns in the past. Indeed, although Defendants do not make the assertion, Plaintiff's temper could even be construed as another legitimate non-discriminatory reason for not promoting Plaintiff.

Third, the evidence also showed that the cardiothoracic surgery department suffered many difficulties, even during Plaintiff's tenure. Therefore, the committee might reasonably have had reservations about hiring an internal candidate. The Court also notes that Dr. Howell stated the committee was not excited about hiring an internal candidate because of the past problems, but did not state that no internal candidate

was qualified. Indeed, Defendants never assert that Plaintiff was not qualified for the position. In fact, Plaintiff himself points to evidence showing that he was in fact offered the position of Co-Chief and that at least one of his superiors thought he did a good job for the period of time when he served as Interim Chief.

Fourth, although Plaintiff and Defendants dispute Plaintiff's research qualifications and whether or not he was provided with the opportunity to perform research at MCG, this fact alone is not sufficient to show pretext. Regardless of what Plaintiff's research opportunities were while at MCG, Plaintiff's CV showed that he was not a senior author on many articles before he came to MCG. Dr. Landolfo's CV, on the other hand, demonstrated extensive research experience.

Finally, Plaintiff has no basis for his claim that the decision not to hire him was "erroneous as a matter of fact." The loss of accreditation occurred two years after Dr. Landolfo was hired and could not have influenced Defendants' hiring decision. Even if MCG's decision to hire Dr. Landolfo turned out to be a bad one in terms of the residency program, this does not show by a preponderance of the evidence that MCG's decision to hire Dr. Landolfo instead of Plaintiff was pretext for racial discrimination. As stated above, this Court will not act as a "super-personnel department" and analyze whether MCG's business decisions were prudent, as long as they were not discriminatory.

Plaintiff has not met his burden of showing pretext for racial discrimination. Therefore, his claims under § 1983 for failure to promote to Chief of Cardiothoracic Surgery are dismissed.

b. Failure to Promote to Full Time Faculty for 2003-2004

In his brief in opposition, Plaintiff admits that his failure to promote to full time claims are time barred except for the academic year of 2003-2004. (Doc. no. 210 at 62.) The Court agrees that Plaintiff's claim for this academic year is not time barred. However, the claim still fails because Plaintiff failed to make his prima facie case. In order to make a prima facie case, Plaintiff would have to satisfy the same elements listed in the previous section. However, Plaintiff has not even attempted to argue these elements. Specifically, Plaintiff points to no evidence to suggest that such a full time position existed. Even if the Court assumes that such a position existed and that Plaintiff was qualified for it, Plaintiff still would need to show that he applied, was rejected, and that the position was filled by someone outside of his protected class. Plaintiff has utterly failed to mention these elements. Rather, under his section entitled "failure to appoint Plaintiff to a full-time faculty position at MCG for the 2003-2004 academic year," Plaintiff mentions that the position of Chief of Cardiothoracic Surgery remained open for over a year and a half, despite Plaintiff applying for it. While this may be true, this fact goes to an entirely separate claim (failure to promote to chief of cardiothoracic surgery) and has nothing to do with the instant claim. Therefore, Plaintiff's failure to promote to full time faculty claim is dismissed because he has failed to make a prima facie showing.

iii. Disparate Pay

Defendants categorize this claim as Plaintiff's "denial of bonus claim" and focus on the fact that Plaintiff's salary was reduced by $10,000 one year because the money was needed for Dr. Landolfo's recruitment. In order to establish a prima facie case for discrimination in terms and conditions of employment, Plaintiff must show: (1) that he was a qualified member of a protected class; (2) that he was subjected to an adverse employment action; (3) that a similarly situated comparator outside of his protected class was treated more favorably. Embry v. Callahan Eye Found., 147 Fed. Appx. 819, 827-28 (11th Cir. 2005) (citing Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004)). Defendants argue that Plaintiff cannot make a prima facie case for discrimination in the terms and conditions of his employment and even if he could, they had a legitimate, nondiscriminatory reason: the Department of Surgery did not have the additional discretionary funding to provide Plaintiff with the bonus for a second year because of the financial commitment made to recruiting Dr. Landolfo.

Inexplicably, Plaintiff entirely fails to mention this claim in his sixty-seven page brief in opposition to Defendants' Motions for Summary Judgment. Nor does Plaintiff respond to either of the reply briefs filed by Defendants where they point out that Plaintiff neglected to argue this and several other claims in his brief in opposition. Plaintiff merely lists in his Complaint that he has an equal protection claim under § 1983 for disparate pay. (Pl.'s Am. Compl. Par. 56.) The Court is unable to discern whether Plaintiff intended this claim to relate specifically to the denial of bonus or some other instance of unequal pay. Regardless, this Court cannot frame Plaintiff's claim and argue it for

him. Even if this Court were to assume Plaintiff could make a prima facie case, the Defendants have offered a legitimate, non-discriminatory reason for their action and Plaintiff has not even attempted to rebut their assertion. Therefore, Plaintiff has failed to meet his burden under McDonnell Douglas and his disparate pay claim is dismissed.

iv. Disparate Treatment in Terms of Office Space

To make a prima facie case for this claim, Plaintiff would have to prove the same elements as listed in the previous section. However, here again, Plaintiff has entirely failed to mention this claim in his response in opposition to Defendants' Motions for Summary Judgment. Assuming, arguendo, that this claim could rise to the level of an "adverse employment action," Plaintiff has not explained how this action amounts to racial discrimination when he was treated exactly the same as Dr. Anstadt, who is white. Also, Plaintiff does not dispute that this office move took place during renovations, which to this Court is a legitimate non-discriminatory reason for this action.

Granted, Plaintiff and Dr. Anstadt were not moved into the newly renovated office space after the renovations were completed. They were each moved to their own offices in the old section of the building. While the actual date of this move is unknown, Plaintiff testified that the relocation to the "bull-pen" took place between July and December 2003 and that the renovations lasted three or four months. After the expiration of this three to four month period, Plaintiff and Dr. Anstadt were moved to old offices. At that point, however, both Plaintiff and Dr. Anstadt were aware that they were

being terminated and Plaintiff's last day, December 31, 2003, was approaching. Thus, according to his own testimony, Plaintiff could not have been forced to suffer the indignity of an un-renovated office for more than three months. However, even if this Court could be persuaded that this treatment constitutes an adverse employment action, Plaintiff has again failed to even attempt to meet his burden under McDonnell.., Douglas. Therefore, Plaintiff's claims for disparate treatment in terms of office space under § 1983 and under Title VII are dismissed.

v. Wrongful Termination

To establish a prima facie case for wrongful discharge, Plaintiff must show that (1) he is a member of a protected minority; (2) he was qualified for the job; (3) he suffered an adverse employment action; and (4) he was replaced by a person outside his protected class or was treated less favorably than a similarly-situated individual outside his protected class. Shockley v. HealthSouth Ctr. Ga. Rehab. Hosp., 293 Fed. Appx. 742, 745 (11th Cir. 2005) (citing Maynard v. Bd. Of Regents of the Div. of Univ. of the Fla. Dep't of Educ., 342 F.3d 1281, 1289 (11th Cir. 2003)). Defendants argue that Plaintiff cannot meet the fourth prong because Plaintiff's part-time position was never filled. However, Defendants' view is too narrow. Even if Plaintiff's exact position was never filled, other surgeons were brought in to do the work that Plaintiff had been doing. Therefore, the Court finds Plaintiff has made his prima facie case.

Defendants have provided evidence of a legitimate non-discriminatory reason for terminating Plaintiff: that Dr.

Landolfo wanted to bring in his own team, which is typical for faculty recruited into leadership positions. Indeed, Plaintiff acknowledges in his deposition that it is common practice for chiefs of sections in hospitals to have a significant role in choosing who will be on their surgical team. (Pl.'s Dep. at 89.) Furthermore, Dr. Anstadt was also fired. The fact that both a black surgeon and a white surgeon were fired adds credence to Defendants' contention that Dr. Landolfo simply wanted his own team.

Finally, Plaintiff has once again failed to meet his burden under McDonnell Douglas by showing by a preponderance of the evidence that Defendants' stated reasons were pretext. The Court notes that it is not clear that Plaintiff addressed his wrongful termination claim at all in his response in opposition to Defendants' Motions for Summary Judgment. Even if this Court gives him the benefit of the doubt and considers the pretext argument Plaintiff made under his failure to promote claim in this context, his wrongful termination claim still fails. As shown above, none of his arguments are sufficient to show pretext. Therefore, Plaintiff's wrongful termination claims under § 1983 and Title VII are dismissed.

E. Plaintiff's § 1985 Conspiracy Claim

Plaintiff brings his conspiracy claim against all Defendants. The two-year statute of limitations that applies to § 1983 claims also applies to § 1985 claims. Rozar v. Mullis, 85 F.3d 556, 561 (11th Cir. 1996).

A conspiracy claim under § 1985(3) requires a plaintiff to show: "(1) a conspiracy; (2) for the purposes of

depriving . . . any person or class of persons of the equal protection of the laws. , .; and (3) an act in furtherance of the conspiracy; (4) whereby a person is [injured] . . . or deprived of any right or privilege of a citizen of the United States." Burrell v. Bd. Of Trs. of Ga. Military College, 970 F.2d 785, 793-94 (11th Cir. 1992)(quoting United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825, 828-29 (1983)). Under the second element, a plaintiff must point to some "classbased, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

Plaintiff alleges that Defendants conspired to deprive him of due process and equal protection; the same claims Plaintiff brings under § 1983 and Title VII. As this Court has concluded that Plaintiff's substantive claims fail on their merits, his conspiracy claim must also fail because Plaintiff has not been "deprived of any rights or privilege" by Defendants. See Denney v. City of Albany, 247 F.3d 1172, 1190 (11th Cir. 2001) . Thus Plaintiff's claim under § 1985(3) is dismissed.

F. Plaintiff's Claim under Title VI

Plaintiff brings his Title VI claim solely against the BOR. Title VI provides "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d. With respect to employment actions, a Title VI action can only be brought "where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3. Plaintiff has

failed to point to any evidence showing that the BOR received federal funding or that the primary purpose of that funding was to provide employment. See Mayfield v. Hart County School Dist., 2006 WL 1652299, *9 (M.D. Ga. June 9, 2006). Therefore, Plaintiff's Title VI claim fails as a matter of law.

G. Plaintiff's Claim for Attorney's Fees

Plaintiff brings a claim for attorney's fees under 42 U.S.C. § 1988. This statute provides for attorney's fees for the prevailing party in actions to enforce provisions of various statutes, including § 1983 and § 1985. However, because Plaintiff has not prevailed on these claims, he is not entitled to attorney's fees under § 1988. Therefore, Plaintiff's claim for attorney's fees is dismissed.

III. Conclusion

Upon the foregoing, Plaintiff's Motion to Extend Discovery (doc. no. 278) is DENIED. Plaintiff's Rule 56(f) Motion (doc. no. 296) and his Motion to Reconvene Depositions (doc. no. 317) are DENIED. Plaintiff's Motion to File a Second Amended Complaint (doc no. 282) is DENIED. Defendants' Motion to Seal Plaintiff's Proposed Second Amended Complaint (doc. no. 300) is GRANTED. Finally, the Private Defendants' Motion for Summary Judgment (doc. no. 183) and the State Defendants' Motion for Summary Judgment (doc. no. 193) are GRANTED. The Clerk is directed to terminate all motions and CLOSE the case.

ORDER ENTERED at Augusta, Georgia, this 27th day of March, 2009.

HONORABLE J. RANDAL HALL
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

Footnotes

[1]In addition to this Renewed Motion to Extend Discovery, Plaintiff has filed a Rule 56(f) Motion seeking to extend discovery for six months. (Doc. no. 296.)

[2]Specifically, Plaintiff attempted to question Dr. Landolfo about whether he was planning to leave MCG. (See Cont'd Landolfo Dep.)

[3]The Court also notes that Plaintiff received the peer review information and took six depositions regarding peer review information before he filed his brief in opposition to Defendants' motions for summary judgment. Plaintiff filed his brief in opposition on July 22, 2008. (Doc. no. 319.) The six depositions related to peer review information were taken from May 5-9, 2008, and included continued depositions of Dr. Landolfo, Snell, and Goldstein. However, Plaintiff did not cite to any of these continued depositions in his brief in opposition. Therefore, the Court can see no reason to allow Plaintiff to reopen discovery in order to depose these individuals yet again.

[4]The Clerk is therefore instructed to seal the entirety of doc. no. 282.

[5]Plaintiff was granted leave to file an Amended Complaint on November 30, 2005 in order to remove MCG as a Defendant and add MCG Health, Inc. (Doc. no. 59.) Plaintiff's Amended Complaint contains only the amendment of the caption and does not restate or incorporate the allegations and claims from his original

Complaint. (See Doc. no. 61.) In their motions for Summary Judgment, Defendants argue that the Amended Complaint supersedes the Original Complaint and therefore the case should be dismissed because the Amended Complaint contains no allegations. However, because this argument was not raised until this late stage in this litigation, the Court will consider the Amended Complaint as incorporating the Original Complaint and in this Order will refer to the documents jointly as "Pl.'s Am. Compl."

[6]It is unclear whether they were offered the position of Interim Co-Chiefs or Co-Chiefs.(See Anstadt Dep. at 175.)

[7] Plaintiff points out that one of the surgeons Dr. Landolfo hired, Dr. Jim St. Louis, had to train with Dr. Moore for eighteen months in order to fill the position for pediatric surgery and that Plaintiff was offered no such opportunity to complete another fellowship in order to gain any additional skills Dr. Landolfp might have been seeking. (Landolfo Dep. at 156-157)

[8]Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985) (per curiam) .

[9]The Court notes that the Private Defendants have asserted that they were not acting under color of state law and thus cannot be liable under § 1983. They also assert that Don Snell has no official capacity and thus any claim against him in his official capacity should be dismissed. Also, Defendants Rahn and Stern have asserted qualified immunity from Plaintiff's § 1983 claims. The Court, however, need not address these defenses because Plaintiff's § 1983 claims fail as a matter of law.

[10] The Court notes that Plaintiff only listed two of these claims, wrongful termination and disparate treatment in terms of office space, in his Charge of Discrimination

with the EEOC. (Pl.'s Dep. Ex. 40.) Accordingly, Plaintiff is barred from raising the other two claims under Title VII because he failed to exhaust his administrative remedies. See Gregory v. Georgia Dept. of Human Resources, 355 F.3d 1277, 1280-81 (11th Cir. 2004) (judicial claims that clarify, amplify, or focus claims contained in the charge of discrimination are allowable, but allegations of new acts of discrimination are inappropriate) .

6/1/2010
No. 09-12130, No. 09-16172
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KWABENA MAWULAWDE, M.D.,
Plaintiff-Appellant,

versus

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, DANIEL W. RAHN, M.D., Indiv. and in his Official Capacity as President, Medical College of Georgia DAVID STERN, Indiv. an in his Official Capacity as Dean, School of Medicine, Medical College of Georgia, DON SNELL, Indiv. and in his Official Capacity as President and CEO, MCG Health, Inc., MCG HEALTH, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before BIRCH, BARKETT and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

CIVIL ACTION FILE NO. 1:05-CV-99
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

KWABENA MAWULAWDE, M.D.
Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al
Defendants.

PLAINTIFF'S REPLY TO THE DEFENDANTS' RESPONSES TO PLAINTIFF'S RENEWED MOTION TO EXTEND THE TIME FOR DISCOVERY AND MOTION FOR MODIFICATION OF PRIOR DISCOVERY ORDERS

COMES NOW PLAINTIFF in the above-styled action and pursuant to Rule 6 of the Federal Rules of Civil Procedure, and files this his *Reply to the Defendants' Responses to Plaintiff's Renewed Motion to Extend the Time for Discovery And Motion for Modification of Prior Discovery Orders.*

I. Plaintiff has had Insufficient Time to Complete Discovery Relating to "Peer Review Information"

On August 19, 2005 the Court entered a scheduling order providing that discovery was to be completed within four months or by December 23, 2005.

(Doc. 8). On September 1, 2005, Plaintiff filed a motion to exceed the number of interrogatories, requests for production of documents, and requests for admissions to the party defendants. (Doc. 11). On October 6, 2005, the Court entered an Order denying Plaintiff's motion to exceed. (Doc. 23). On October 17, 2005, Plaintiff filed objections to the Magistrate Judge's October 6, 2005 Order. (Doc. 24).

On November 8, 2005, Plaintiff filed a motion for extension of time to complete discovery. (Doc. 37). On November 15, 2005, the Magistrate Judge' Order (Doc. 23) was affirmed.

On November 30, 2005, the Court entered an Order (Doc. 59) granting in part and denying in part, Plaintiff's motion for extension of time to complete discovery giving the parties until February 28, 2006 to complete discovery. The parties exchanged written discovery and took several depositions during the discovery period. However, because Plaintiff had not yet obtained relevant discovery sought, on February 23, 2006, Plaintiff filed another motion for extension of time to complete discovery (Doc. 77). Because the defendants withheld much of the information sought by Plaintiff on the basis of Georgia's "peer review" privilege, Plaintiff was forced to file a motion to compel seeking the same, among other things.

On March 21, 2006, the Court entered an order staying discovery and indicating that "the Court will enter a further Order giving the parties an additional 30 days in which to complete discovery." (Doc. 92). On April 27, 2006, the Court entered an Order granting in part and denying in part, Plaintiff's motion to compel.

(Doc. 102). Said order denied Plaintiff's access to materials which are subject to peer review and medical review privileges. The April 27, 2006 Order also required that the parties confer regarding certain discovery issues and report to the court. On May 12, 2006, the parties filed a joint motion for extension of time to file a response to the Court's April 27, 2006 Order (Doc. 109) and a joint motion for stay of discovery pending resolution of discovery issues (Doc. 110). On May 15, 2006, Plaintiff filed objections to the Magistrate Judge's April 27, 2006 Order denying access to peer review information. (Doc. 111).

On May 22, 2006, Plaintiff's objections to the Magistrate Judge's April 27, 2006 Order were overruled and the Magistrate Judge's Order was affirmed. (Doc. 117). On July 11, 2006, the Court entered an Order granting Plaintiff's motion for reconsideration of the Order of May 22, 2006 and affirmed the Magistrate Judge's April 27, 2006 Order denying access to peer review information. (Doc. 131) As such, although there was additional discovery obtained in the case, Plaintiff was unable to obtain access to information that the defendants claimed a peer review privilege to until after the court reopened discovery in light of the Eleventh Circuit Court of Appeals decision in Adkins v. Christie, 488 F.3d 1324 (11th Cir. 2007), hereinafter referred to as the *Adkins* case.

The Court's order reopening discovery limited the scope of discovery to information previously withheld on the basis of peer review privilege. Plaintiff contends that this limitation was unreasonable given the posture of the case and Plaintiff's continued

inability to obtain discoverable information in a timely manner as demonstrated by the several motions for extensions of the discovery period and motions to compel that Plaintiff has been forced to file in this case. Despite such filings, however, and despite the clear mandate of the *Adkins* case, Plaintiff has still not yet been able to obtain discovery of materials that have been withheld based upon the peer review privilege. See Exhibit A, attached hereto, which is an attempt by Plaintiff counsel seeking to have the defendants supplement their written discovery requests by March 4, 2008. Even though various documents were received by Plaintiff on March 3, 2008, the defendants filed no formal responses to Plaintiff's written discovery requests wherein the peer review objections had been raised. Plaintiff has attached hereto, as Exhibits B through G, relevant pages copied from several discovery responses of the various defendants to Plaintiff's written discovery requests that contain objections, based upon Georgia's peer review privilege. As shown below, the defendants have not provided any supplemental responses to these written interrogatories in accordance with the Federal Rules of Civil Procedure despite the *Adkins* opinion and the orders of this Court requiring that peer review information be disclosed.

Moreover, and more important, Plaintiff had not been able to obtain discovery of information that Plaintiff contends should not have been withheld based upon the peer review privilege notwithstanding the *Adkins* opinion as demonstrated by the arguments and citations presented herein below. Items that may lead to the discovery of admissible evidence, such as curriculum vitaes and personnel action request forms

were contained in the documents marked as "confidential" that have been produced by the defendants subsequent to this Court's orders allowing the discovery of peer review information. As shown below, this information is in fact not "peer review" as that term is used and defined by the peer review statutes and Georgia caselaw. It is fundamentally unfair to allow the defendants to improperly assert the privilege, withhold the information from Plaintiff and then restrict Plaintiff's ability to use such information during discovery to obtain additional evidence that may not be related to "peer review" information as required by the Court's April 21, 2008 Order (Doc. 276).

In addition to being able to conduct further discovery that is not limited to discovery related to "peer review" information, Plaintiff needs the six month time period requested for several reasons. First, the Defendants should be ordered to supplement all written discovery requests wherein they objected to producing information based upon the "peer review" privilege. After receiving this information, Plaintiff should have time to serve requests for admissions and/or additional written discovery requests to follow up on the "peer review" information obtained. Given the time constraints, Plaintiff has not been able to do this with the information recently disclosed as the Court's August 24, 2007 Order expressly provided that, "[u]pon receipt of all peer review materials allowed under this Order, in accord with Fed. R. Civ. P. 30, Plaintiff is free to reconvene any depositions and to conduct any new depositions necessary to pursue any inquiries previously foreclosed by the Magistrate Judge's peer review ruling." As stated earlier, and as demonstrated by Exhibits B through G, Plaintiff has

not obtained supplemental responses to his written discovery requests that were objected to on the basis of "peer review." Plaintiff will necessarily need time to consult with the appropriate medical expert(s), if necessary in order to be able to review the information received and present to the Court and/or opposing parties in a meaningful manner.

II. The Defendants Have Not Properly Asserted Rule 33(d)

In *Private Defendants' Response to Plaintiff's Motion to Extend Discovery*, the private defendants did not offer an explanation as to why they never responded to McGriff's request that they supplement written discovery providing "peer review" information by March 4, 2008, but instead argued that, "The peer review materials produced to the plaintiff contain the information sought by his interrogatories, and the plaintiff has had ample opportunity to review them. Federal Rules of Civil Procedure 33(d) specifies that a party may properly respond to an interrogatory by providing responsive documents for inspection. Nothing further is required." See Private Defendants's brief, p. 17.

The private defendants did not cite any authority to support this argument and the same is contrary to the express language of Rule 33(d) and the case law interpreting the same. Mere references to hundreds of various documents in no way qualifies, as "full and complete," answers to interrogatories under Rule 33. Cabales v. United States of America, 51 F.R.D. 498, 499 (D. N.Y. 1970). Rule 33(d) is applicable only where the answers to the interrogatory

may be found in the business records of the party upon whom the interrogatory is served. See, Sabel v. Mead Johnson and Co., 110 F.R.D., 553, 555 (D.C. Mass 1986); Calhoun v. Liberty Northwest Insurance Corp., 789 F. Supp. 1540, 1549 (W.D. Wash. 1992). Moreover, Rule 33(d) requires more than just making a statement that the information may be found in the available documents. Calhoun, *supra* at p. 1550, *citing* Budget Rent-A-Car of Missouri, Inc. v. Hertz Corp., 55 F.R.D. 354, 357 (D. Mo. 1972). The rule requires that a party must adequately and precisely specify the records from which the answers can be ascertained in sufficient detail to permit the interrogating party to locate and identify the records. United States S.E.C. v. Elfindepan, S.A., 206 F.R.D. 574, 576 (M.D.N.C. 2002); Budget Rent-A-Car, *supra*, citing, Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inc. Corp., 711 F.2d 902, 906 (9th Cir. 1983)("Rule 33(c) [now (d)] was amended in 1980 to prevent abuse of the business records option. The amendment was "to make it clear that a responding party has the duty to specify the category and location, the records from which answers to interrogatories can be derived.") A prerequisite is that the party invoking the option must be able to represent that the party will be able to secure the information which is sought by the interrogatory in the available records.

The Rule cannot be used as a procedural device for avoiding the duty to give information by shifting the obligation to find out whether information is ascertainable from the records which have been tendered. Sabel, *supra* at p. 555, citing Budget Rent-A-Car of Missouri, Inc., *supra* at p. 357; and In Re: Master Key Antitrust Litigation 53 F.R.D. 87 (D.Conn.

1971); Thomason v. Leiter, 52 F.R.D. (M.E. Ala. 1971). Further, a party electing to produce documents must affirmatively state so under oath. Mackey v. IBP, Inc., 167 F.R.D. 186, 198 (D. Kan. 1996). Here, there has been no such statement as the defendants have failed to supplement their written discovery responses with verified responses indicating what information is responsive to what interrogatories.

Another prerequisite for the use of the Rule 33(d) option is that there must be a burden on the interrogated party if the party were required to answer the interrogatories in the traditional manner. It has been recognized that while this requirement is not specifically stated in the Rule, it is implicit within the provisions of the rule. Sabel, *supra* 110 F.R.D. at p. 556; see, Thomason v. Leiter, supra 52 F.R.D. at p. 291; Pascale v. G.D. Searle & Co., 90 F.R.D. 55, 60-61 (D.R.I. 1981). Here, rather than making a showing that finding the interrogatory responses were more burdensome to the Defendants than the Plaintiffs, the Defendants are seeking to improperly utilize the Rule 33 option with absolutely no showing of burdensomeness at all. Moreover, the Defendants have failed to demonstrate that it would be no more burdensome for the Plaintiffs to go through the documents to pull out answers than for the Defendants. See, S.E.C. v. Elfindepan, S.A., 206 F.R.D. at p. 577. In fact it is much more burdensome and time consuming for the Plaintiff to search through the many pages of documents, when there has been no specificity in the designation as to where the answer may lie.

Under F.R.C.P. 33(b)(3) "Each interrogatory must, to the extent it is not objected to, be answered

separately and fully in writing, under oath." A party cannot plead personal ignorance as an excuse for not answering interrogatories, if indeed the information is within his control. Hickman v. Taylor, 329 U.S. 495, 504 (1947); Pilling v. General Motors Corporation, 45 F.R.D. 366., 369-70 (D. Ut. 1968); The Trane Company v. Philip M. Klutznick, 87 F.R.D. 473476 (W.D. Wis. 1980) citing 8 Wright & Miller, *Federal Practice & Procedure*, § 2172 at 537 (1970). Under Rule 33, a party must give full and complete answers to interrogatories, and provide all information available to him. The Trane Co., supra at p. 476.; Hickman v. Taylor, *supra*. Information which is controlled by a party is available to him. *Id.* In Re: G-I Holdings, Inc., 218 F.R.D. 428, 438 (D.NJ. 2003) held that if documents are not produced in the manner in which they were kept in the ordinary course of business, then the responding party has a duty to specify, by category and location, the records from which it knows the answers to the interrogatories can be found. Rule 34(b) provides that "A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." Fed.R.Civ. P. 34(b), *Also see*, United States S.E.C. v. Elfindepan, S.A., 206 F.R.D. 574, 576 (M.D.N.C. 2002) [the interrogatory response must specify for each interrogatory the actual documents where the information may be found; document dumps do not suffice].

"An interrogatory is a question propounded to a party which that party must answer under oath. A submission by that party's counsel which cross-references pleadings and exhibits is simply not an

answer to that interrogatory by that party. It must be recalled that interrogatories serve not only as a discovery device but as a means of producing admissible evidence; there is no better example of an admission of a party opponent, which is admissible because it is not hearsay, than an answer to an interrogatory." Melius, supra, at *3. Therefore, the defendants should be appropriately sanctioned for their failure to properly supplement their interrogatory responses as required by law and as ordered by the Court.

See also Vica Coal Co., Inc. v. Crosby, 212 F.R.D. 498, 505 (S.D.W.Va. 2003), wherein the district court noted that, "[t]he course taken by Defendant's counsel has undermined the important function and utility of Interrogatories as they have been posed by the Plaintiff in this case. Seeking information through Interrogatories is an efficient and cost-effective method of discovery and marshaling evidence for trial. Indeed, the Rules anticipate that it could lead to the discovery of evidence worthy of admission at trial. Rule 33[] provides that Interrogatory answers may be used at trial 'to the extent permitted by the rules of evidence.' Deviating from the course prescribed by the Rules in any manner or way therefore negates the significant opportunity to introduce evidence obtained through Interrogatories at trial."

Here, the defendants have completely failed to respond to and/or supplement their responses thereby failing to provide discoverable information to the Plaintiff that may be used not only to lead to the discovery of evidence in opposition to the defendants' motions for summary judgment, but admissible

evidence that may also be used at trial. The defendants have failed to adequately respond to any of the interrogatories to which they made peer review objections and have also failed to have a person verify[1] the interrogatory responses. Plaintiff would be forced to not only speculate and/or guess the responses to the interrogatories, but he would also have to guess the identity of the best person to depose in order to obtain further admissible facts and/or testimony[2] regarding the information sought to be discovered by the interrogatories.

III. Plaintiff has Been Deprived of the Opportunity to Conduct Full Discovery in Order To Respond to the Defendants' Motions for Summary Judgment

"[T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, *as long as the plaintiff has had a full opportunity to conduct discovery*." Anderson v.

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[1]Interrogatory answers must be signed by the person making the answers. Morin v. Nationwide Federal Credit Union, 229 F.R.D. 364, 369 (D. Conn. 2005). "Rule 33, requiring verification and signature, is among the simplest of all the Rules of Procedure, and yet it is increasingly ignored." Saria v. Massachusetts Mutual Life Insurance Company, 228 F.R.D. 536, 539 (D.W.Va. 2005).

[2]Verification by the attorney renders the attorney a witness. Saria v. Massachusetts Mut. Life Ins. Co., 228 F.R.D. 536, 538-39 (S.D.W.Va. 2005). The purpose of interrogatories is not merely to gather information but also to obtain statements that can be admitted at trial. Melius v. National Indian Gaming Com'n, 2000 U.S. Dist. LEXIS 22747 (D.D.C. 2000).

Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). (Emphasis Added.) The defendants have repeatedly argued that Plaintiff has not pursued discovery diligently but Plaintiff could not diligently pursue discovery of information that was being intentionally withheld by the defendants no matter how long the discovery period has been because information recently obtained should have been provided long ago before any of the depositions were taken wherein the peer review objections were raised.

Given the fact that Plaintiff was not even able to obtain discovery of peer review information in response to his first written discovery requests, Plaintiff had to necessarily abandon any discovery of any followup discovery of information obtained from the defendants. For example, the document bate stamped no. MCGHI 19328 (Exhibit 1 under seal) relates to a physician who was reprimanded for abusive language and behavior in the operating room. Because it has been designated confidential by the defendants, this document is being filed under seal as required by the Protective Order entered by the Court on February 7, 2008. (Doc. 267).

In his affidavit submitted in support of the defendant MCGHI and Don Snell's motion for summary judgment (Docs. 183, 185), Snell stated that, "allegations of the plaintiff losing his temper, cursing and threatening to bring a bomb to the hospital caused me to question the plaintiff's temper and his leadership abilities." Snell Affidavit, ¶ 61. A thorough evaluation of Snell's handling of the physician referenced in MCGHI 19328 (Exhibit 1 under seal) in December, 2001, would help Plaintiff demonstrate that Snell's

characterization of the allegations concerning Plaintiff[3] as stated in Snell's April, 2007 affidavit are a pretext for discrimination.

This is just one example of the types of information that has been withheld throughout most of the discovery period in this case that could give Plaintiff additional evidence to shed light on the defendant's treatment of him during his employment at the Medical College of Georgia. Additional examples may be obtained from the sealed exhibits attached to *Plaintiff's Memorandum in Support of his Motion for Extension of Time to Complete Discovery & Motion for Modification of Prior Discovery Orders* (Doc. 270), which is adopted fully, and incorporated herein by reference.

Plaintiff contends that to terminate discovery at this time without allowing him the opportunity to fully explore the leads stemming from the peer review documents that have been recently produced and the interrogatory responses that have not yet been provided, will preclude him from having a full and fair opportunity to discover information essential to his opposition to the defendants' motions for summary judgment. "Although the district court may cut off discovery when the record shows that further discovery is not likely to produce the facts needed to withstand the motion for summary judgment, when a party is not given a full and fair opportunity to discover

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[3]The relevant allegations concerning Plaintiff as stated in Snell's Affidavit also occurred in late, 2001, at or around the time that Dr. Zumbro was making it known that he would be stepping down from the chief's position.

information essential to its opposition to summary judgment, the limitation on discovery is reversible error." Brown v. Mississippi Valley State University, 311 F.3d 328, 333 (5th Cir. 2002). This is especially true in this case since the information being sought is primarily in the exclusive possession, custody and control of the defendants. By withholding information under the claim of a peer review privilege until the latest possible moment near the brink of the close of discovery, the defendants have effectively caused the Plaintiff to litigate his case without having meaningful access to the only evidence that could be used to establish that the defendants' actions against him were discriminatory in nature.

"Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memoranda which the college seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears. . . . The peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision." University of Pennsylvania v. EEOC, 493 U.S. 182, 193 (1990), citing EEOC v. Franklin and Marshall College, 775 F.2d, at 116. While Dr. Mawulawde is not claiming denial of tenure, his claim that the defendants failed to offer him a full time position and failed to promote him on the basis of race makes his case analogous to the

Plaintiff in *University of Penn.*

In *University of Penn*, the United States Supreme Court held that, "As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, governmental interest. Often, ... disclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place. Indeed, if there is a 'smoking gun' to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files." University of Pennsylvania v. EEOC, 493 U.S. 182, 193 (1990).

Further, "[a]s a result of this limitation on discovery, the parties have not been afforded the opportunity to develop a record that offers a factual basis for evaluating whether any other equitable relief is warranted or for thoroughly and responsively briefing the legal question of whether 'other appropriate equitable relief' is available to Plaintiff" against the Defendants. See Mank v. Green, 323 F. Supp. 2d 115, 127 (D. Me. 2004).

Throughout all of their objections and oppositions to Plaintiff's attempts to obtained discovery, the defendants have steadfastly argued that Plaintiff should not be allowed further discovery. However, they have never demonstrated that the discovery sought by Plaintiff is not relevant to his claims against the defendants. This is especially true, given the subjective nature of the reasons given for the

disparate treatment of Dr. Mawulawde by the defendants. "While there is nothing inherently wrong with allowing decision makers to base decisions on subjective criteria, we have found that subjective evaluations involving white supervisors provide a ready mechanism for racial discrimination. ... For example, requirements such as the possession of 'initiative and judgment capabilities' and the ability 'to relate to people in a manner to win confidence and establish support' are incapable of objective evaluation. They cannot be relied upon by an employer seeking to defeat the plaintiff's prima facie case by showing that the plaintiff is less qualified than the applicant chosen for the promotion." Carter v. Three Springs Residential Treatment, 132 F.3d 635, 644 (11th Cir. 1998). (Citations Omitted.) In Carter, the Eleventh Circuit Court of Appeals held that, "[a]dditionally, we note that Carter produced additional circumstantial evidence that does not neatly fall into the *McDonnell Douglas* framework that, nevertheless, is relevant to the issue of pretext. For example, Carter proved that Three Spring had a policy of posting job vacancies, not adhered to in this case. We have held that the failure to promulgate hiring and promotion policies can be circumstantial evidence of discrimination. ... Certainly, it is even more suspicious where it is alleged that established rules were bent or broken to give a non-minority applicant an edge in the hiring process." Id. (Citations Omitted.) Similarly here, as demonstrated by the exhibits attached to Plaintiff's initial motion, (Doc. 270), it appears that the defendants have also failed to follow their own policies as it relates to the treatment of Dr. Mawulawde and Plaintiff should be allowed access to all discovery related to their failure to do so.

In addition, "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. ... In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 (2000). (Citations Omitted.)

IV. The Defendants Have Improperly Asserted The Peer Review Privilege

Here, the defendants asserted the peer review privilege with respect to information contained within the credentialing files of the physicians on the faculty of the Medical College of Georgia, to include the Plaintiff. In McCall v. Henry Medical Center, Inc., 250 Ga. App. 679, 684 (2001), the Georgia Court of Appeals held that, "[t]he confidentiality provisions of this article shall also apply to any proceedings, records, actions, activities, evidence, findings, recommendations, evaluations, opinions, data, or other information shared between review organizations which are performing a peer review function. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such organization." The Georgia Court of Appeals in McCall held that, "it

appears from the record that some requested material may have been discoverable, and that the material may have been relevant to McCall's cause of action." Id.

Because the defendants here did not sufficiently describe the information withheld, Plaintiff was not able to fully demonstrate to the Court in his motion to compel how the defendants were improperly asserting the privilege. In its July 11, 2006 Order, (Doc, 131), when reviewing Plaintiff's objections to the Magistrate Judge's April 27, 2006 order denying access to peer review information, the court held that, "***Plaintiff has repeatedly failed to cite to the record and specifically identify instances where Defendant MCG Health, Inc. has improperly invoked a privilege.***" (Footnote Omitted). As demonstrated herein below, without first having possession of the documents to which the claim of privilege was made, it would have been very difficult, if not impossible, for Plaintiff specifically identify instances where Defendant MCG Health, Inc. improperly invoked the peer review privilege.

However, now, since Plaintiff have obtained some of the documents that have been improperly withheld, he is able to do so. For example, MCGHI 20620, which is being filed under seal as Exhibit 2 is a perfect example. MCGHI 20620 is the Curriculum Vitae of an Associate Clinical Professor of Surgery, who according to the vitae, is a Caucasian Male who obtained his M.D. Degree from the Medical College of Georgia in 1983. Plaintiff contends that this document should never have been withheld from discovery and is not protected by Georgia's peer review privilege notwithstanding the defendants designation of the

same as "Confidential" under the Protective Order entered by the Court on February 7, 2008 (Doc. 267). Of interesting note, of the 57 curriculum vitae that Plaintiff's counsel selected to have copied from the credentialing files of physician faculty members at MCG, 15 contained the race (white) of the person submitting the curriculum vitae. Cf. Wrenn v. New York City Health and Hospitals Corporation, 664 F. Supp. 773, 780 (S.D.N.Y. 1987), wherein the district court held that, "since plaintiff's resume did not contain a photograph and did not indicate his race, there is no evidence that anyone reviewing plaintiff's applications for these 14 positions was even aware that plaintiff is black." Here, it is clear that many of the physicians on the medical staff at the Medical College of Georgia deemed it important to include their race (white) on their curriculum vitae.

In isolation, this may not appear to be significant but when combined with the document bate stamped number MCGHI 21756,[4] this practice appears to be more suspicious. Document no MCGHI 21756 (Exhibit 3 under seal) is the first page of a credentialing application according to the deposition testimony of Ms. Pamela Whitehead. (Whitehead Depo., p. 54) This document also contains a "W / M" that appears to have been written with a marker and according to Ms. Whitehead was written by a someone other than her. Ms. Whitehead did write on the front page of the

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[4]This particular physician's curriculum vitae (MCGHI 21756), like the physician whose curriculum vitae (MCGHI 20620), indicates that he is a Caucasian male, also indicates that the physician obtained his graduate training at the Medical College of Georgia. (See Exhibit 3, filed under seal MCGHI 21767).

application MCGHI 21756 that this particular physician is a "Caucasian male." (Whitehead Depo., p. 55) Ms. Whitehead indicated that she wrote this on the application to "distinguish between the two," the physician identified on the application and another physician who was not at the Medical College of Georgia. Id., pp. 55-56. She testified that the "W / M" entry on the application was not made by her and that it "would have to have been made after" she made her entry "Caucasian male." Id., at p. 63. She also testified that she "assumed" that the "W / M" entry meant white male but she did not "know."[5] Id., at 63.

These are the types of facts that could lead a reasonable jury to infer that the actions taken taken against Dr. Mawulawde were because of his race and/or national origin. While these facts where withheld on the basis of an asserted peer review privilege, they are not in reality, protected by the peer review privilege and Plaintiff should therefore not be limited in pursuing further similar relevant[6] discovery related to patterns

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[5]See Barefield v. The Board of Trustees of the California State University, 560 F. Supp. 2d 1244, 1268 (E.D. Cal. 2007), wherein the district court held that, "Murie's knowledge of Barefield's race is not necessarily evidence of discrimination, but the fact that he insists that he did not know Barfield's race notwithstanding evidence of race in the resume and application he reviewed seems internally inconsistent and, viewed in the light most favorable to Plaintiff, could give rise to an inference that the reason he denied knowing her race was to disguise his use of an impermissible motive."

[6]"The rules regarding relevancy, however, are quite liberal and provide that 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

or practices that may be concealed within the credentialing files of physician faculty members of the Medical College of Georgia.

VI. Discovery Should be Extended to Allow for the Completion of Dr. Landolfo's Deposition

During the deposition of Dr. Landolfo, Plaintiff had to certify certain questions to be submitted for the court's consideration. Plaintiff will file a separate motion regarding this deposition testimony and Dr. Landolfo's deposition testimony in general. Said motion is adopted by reference and incorporated herein as the discovery period must necessarily be extended in order to obtain the discovery sought from Dr. Landolfo, if allowed by the Court.

VI. The Discovery Period Should Be Continued as a Sanction for the Defendants' Failure to Supplement Their Interrogatory Responses.

"In reviewing a contention that answers were not properly supplemented within the strictures of *Rule 26(e)*, a court 'should look to the conduct of the trial, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response. ... To this we might add that the reason for the proponent's failure to update his discovery seasonably, as *Rule 26(e)(1)* requires, should also be carefully examined." Thibeault v. Square D Company, 960 F.2d 239, 244 (1st Cir. 1992). Here, the defendants

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evidence' is relevant." Robinson v. Runyon, 149 F.3d 507, 512 (6th Cir. 1998).

have not offered any reason for their failure to update their interrogatory responses with information previously withheld based upon the peer review privilege.

WHEREFORE, Plaintiff respectfully requests that upon consideration of *Plaintiff's Renewed Motion to Extend the Time for Discovery and Motion for Modification of Prior Discovery Orders*, that his Motion to Extend the Time for Discovery and his Motion for Modification of Prior Discovery Orders be granted and that he be allowed six months or a reasonable amount of time to pursue discovery of any and all evidence that may be obtained as a result of a lead from the recently produced information, regardless of whether such information is related to "peer review" as that term is defined by federal courts interpreting said term and/or as it is defined by Georgia statutory or case law. Plaintiff requests six months because of the nature of the information sought to be discovered and the potential need for expert testimony related thereto and the difficulty collaborating the schedules of the parties, witnesses and counsel in order to complete the discovery sought.

This 20th day of June, 2008.

Respectfully Submitted,
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CIVIL ACTION FILE NO. 1:05-CV-99
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

KWABENA MAWULAWDE, M.D.
Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al
Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiff files this motion for leave to amend his Complaint to add additional facts obtained in discovery that were not known to him when his original Complaint was filed and to expressly state an additional statute which may afford him relief for his § 1983 claims because "damages claims against state actors for § 1981 violations must be brought under § 1983." Bolden v. City of Topeka, 441 F.3d 1129, 1137 (10th Cir. 2006). See also Butts v. County of Volusia, 222 F.3d 891 (11th Cir. 2000). Plaintiff contends that because of the nature of his claims and the similarity of the Title VII and § 1981 claims,[1] leave should be granted to allow the amendment. Since it is not sufficiently clear in Plaintiff's original Complaint that Plaintiff is also seeking relief pursuant to § 1981, the amendment should be allowed as the district court in Bolden held that, "even if Mr. Bolden had not been sufficiently clear

about bringing the § 1981 claim under § 1983, the district court should have permitted him to amend his complaint to do so." Bolden, supra, at 1137. "Generally, where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Id., at 113 citing Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir.1991). See also Greenwood v. Ross, 778 F.2d 448, 455 at FN3 (8th Cir.1985).

The claims being asserted in the Second Amended Complaint are no different from those being asserted in the original complaint, i.e., intentional discrimination against Plaintiff with respect to his employment at the Medical College of Georgia due to his race, Black, and national origin, Jamacian.

"The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Foman v. Davis, 371 U.S. 178,181-182 (1962). The United States Supreme Court in Foman, further held that, "if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Id., at 182. This is especially true in this case since the Plaintiff has been prejudiced in his ability to obtain discovery of material facts in this case that are relevant to the claims made in the proposed amendment.

When reviewing his motion for leave to amend the Complaint, Plaintiff requests that the Court also

consider his Renewed Motion to Extend the Time For Discovery and Motion for Modification of Prior Discovery Orders (Doc. 278), which is incorporated herein by reference.

Plaintiff contends that the manner in which the defendants have withheld evidence in this case and the time constraints imposed after Plaintiff finally received such evidence, has made it difficult, if not impossible, for Plaintiff to fully present said evidence in opposition to the Defendants' motions for summary judgment. In Greenwood, the Eight Circuit Court of Appeals held that, "the district court must permit appellant to present evidence which would show that appellees' legitimate nondiscriminatory reason is pretextual if appellant was not permitted to present such evidence at the first trial. The district court may receive any other admissible evidence which would be helpful in determining appellees' liability on the § 1983 charges." Id., at 457.

With the exception of seeking relief for being denied the full time position occupied by Dr. Anstadt on July 1, 2000, the claims raised by Plaintiff's amended Complaint and the 42 U.S. C. § 1981 claims asserted therein are timely as they involved acts and/or omissions that occurred within 4 years[2] of the September 2, 2004 date that Plaintiff's Complaint was filed in Fulton County Superior Court. Further, said claims should relate back to the date of the filing of the original Complaint because they relate to the same transactions and occurrences provided in the original Complaint.

"The standard by which an amended complaint relates

back to the date of the original complaint for purposes of tolling the statute of limitations is set out in Federal Rules of Civil Procedure 15(c).... Rule 15(c)(2) has its roots in the equitable notion that dispositive decisions regarding a case should be based on the merits rather than technicalities. [] Thus, the principal purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the adversary will not be prejudiced. [] Rule 15(c) and the relation back doctrine have uniformly been applied to amendments that change the theory on which the Plaintiff seeks recovery." Haltek v. Village of Park Forest, 1995 U.S. Dist. LEXIS 10888, * 6-*7 (N.D. Ill. 1995). (Citations Omitted.) "Rule 15(c)(2) does not bar an amendment from relating back merely because it relies on a new and different theory of recovery. Rather, it bars new and different claims if they do not arise out of the conduct initially plead in the original complaint." Id., at *9.

Plaintiff did not know how the Board of Regents of the University System of Georgia's policies provided for the filling vacancies for faculty positions at the time that Dr. Mark Anstadt was hired by the Medical College of Georgia in July , 2000. Moreover, with respect to the manner in which he was being treated, Plaintiff did not know that such policies were not being followed until this action was filed and he engaged in discovery. At the time that Dr. Anstadt was hired, Plaintiff did not know that Dr. Anstadt was filling a position that had been vacant since 1995 and Plaintiff did not know that the position was open even though he had been working as a cardiothoracic surgeon at the Medical College of Georgia and in the Augusta area for almost a year when Dr. Anstadt was hired. In fact, Plaintiff was

under the impression that the Medical College of Georgia was seeking to hire him as a faculty member at the Medical College of Georgia several months prior to Dr. Anstadt being hired. "It is too much for the law to expect an employee to sue his employer for age discrimination at the same time he is led to believe the employer is trying to place him in another job." Cocke v. Merrill Lynch & Company, Inc., 817 F.2d 1559,1561-1562 (11th Cir. 1987). Therefore, Plaintiff contends that the statute of limitations regarding the failure to give him the position filled by Dr. Anstadt should be tolled.

Furthermore, since both he and Dr. Anstadt both performed the same job during his employment at the Medical College of Georgia, Plaintiff's § 1981 claims should be evaluated throughout the time period that they were both employed as assistant professors in the cardiothoracic surgery department at the Medical College of Georgia. "Mentally and physically the effort required of all teaching faculty members is substantially the same." Marshall v. Georgia Southwestern College, 489 F. Supp. 1322, 1327 (M.D. Ga.1980). "Equal work means work that is substantially equal, not necessarily identical, in all respects. Equality is to be judged not by job classification or titles, but by actual work performance entailed in a job." Id., at 11329. The district court in Marshall also held that, "The term `skill' as it relates to performance of a particular job `includes consideration of such factors as experience, training, education and ability.' [] These factors however refer `not to the experience, training, and education that a particular individual happens to possess, but to the experience, training, and education required by the job itself.'" Id.

Plaintiff's section 1981 claims may be properly brought pursuant to 42 U.S. C. § 1983 to the extent the defendants were acting under color of state law. MCGHI is a private corporation and Plaintiff contends that there maybe genuine issues of material fact regarding whether MCGHI's officers, employees, agents, and/or representatives were acting under color of law[3] regarding Plaintiff's employment at the Medical College of Georgia. As such, Plaintiff contends that he should be allowed to pursue his claims under all relevant statutes (Title VII, 42 U.S. C. § 1983 and 42 U.S. C. § 1981) in order to insure that he obtains full relief under the applicable laws protecting him from discrimination on the basis of his race and national origin, regardless of whether the defendants were acting under color of state law when discriminating against him.

In Gutzwiller v. Fenik, 860 F.2d 1317, 1332 (6th Cir.1988), the Sixth Circuit Court of Appeals held that, "Gutzwiller's suit sought equitable relief under Title VII and both legal and equitable relief under section 1983. The section 1983 equal protection claim and the Title VII claim arose out of the same underlying facts. In order to prevail under either claim, discriminatory intent causing the adverse employment action must be established by a preponderance of the evidence." "The equitable remedies awarded under both section 1983 and Title VII have the goal of making persons whole for injuries suffered on account of unlawful employment discrimination." Id., at 1333.

Similarly here, since Plaintiff should be allowed to amend his Complaint in order to obtain relief afforded by all statutes covering his employment discrimination

claims, notwithstanding the fact that the defendants have filed motions for summary judgment. The Eleventh Circuit Court of Appeals has held that, "[a]t the summary judgment stage, the proper procedure for plaintiff's to assert a new claim is to amend the complaint in accordance with Fed.R.Civ.P.15(a)." Gilmour v. Gates, 382 F.3d 1312, 1315 (11th Cir. 2004).

Recent discovery responses show that justice requires that any such amendments to the Complaint be allowed in this case.

CONCLUSION

In light of the foregoing, Plaintiff's motion for leave to amend his complaint should be granted and the Court should enter an Order providing that the Second Amended Complaint that is attached to Plaintiff's motion is deemed to have been filed on the date hereof. Further, the Court should grant Plaintiff such further and additional relief caused by the defendants' intentional delay in responding to the proper discovery requests propounded by Plaintiff in this case.

This 6th day of June, 2008.

Respectfully submitted,
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Footnotes

[1]While employment discrimination claims brought under Title VII, 42 U.S. C. § 1981, and 42 U.S. C. § 1983 are analyzed under the same evidentiary standard, ... they differ in terms of individual liability. Individuals are not liable under Title VII in either their individual or official capacity." Knox v. City of Monroe, 2008 U.S. Dist. LEXIS 19154, * 9-* 10 at FN5 (W.D. La. 2008).

[2]See Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 383 (2004), wherein the United States Supreme Court, in holding that the statute of limitations on the plaintiff's § 1981 claims was four (4) years held that, "The 1991 Act overturned Patterson v. McLean Credit Union, 491 U.S. 164] by defining the key `make and enforce contracts' language in § 1981 to include the `termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'"

[3]The determination of whether there is action under color of state law is a `necessarily fact-bound inquiry.'" (Citations Omitted.) Crenshaw v. Lister, 2008 U.S. Dist. LEXIS 2989, *9 (M.D. Fla. 2008).

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BOARD OF REGENTS OF THE UNIVERSITY.
SYSTEM OF GEORGIA, et al
Defendants.

SECOND AMENDED COMPLAINT

NOW COMES Plaintiff, Kwabena Mawulawde, M.D., and pursuant to Rule 15 of the Federal Rules of Civil Procedure, and by Order of the Court, and files this, his Second Amended Complaint.

Introduction

On September 2, 2004, Plaintiff filed his Complaint for Damages and Injunctive Relief, hereinafter referred to as, "original Complaint," in the Superior Court of Fulton County. Plaintiff hereby adopts fully and incorporates herein by reference each and every allegation as expressly provided in his original Complaint as if stated fully herein. Further, Plaintiff hereby amends his original Complaint by adding the additional relevant facts and the additional count provided hereinafter.

ADDITIONAL FACTS RELEVANT TO ALL COUNTS

1.

In his initial contact with the Medical College of Georgia after Dr. Zumbro became chief, in mid 1999, Dr. Mawulawde made a telephone call to the Medical College of Georgia and asked to speak with the chief of the surgery department. Later, Dr. Zumbro returned his call and they started talking, but Dr. Mawulawde was not told at that time that there was a full time position available a the Medical College of Georgia for a faculty member in the cardiothoracic surgery department.

2

When he invited Dr. Mawulawde to join his private practice, Dr. Zumbro "had a feeling [Dr. Mawulawde] would eventually fit into MCG," even though Dr. Mawulawde was not offered a faculty position prior to beginning to work at MCG. Normally, physicians applying for medical staff privileges for the Medical College of Georgia Hospital and Clinics would be appointed to the faculty prior to applying for medical staff privileges.

3.

Dr. Mawulawde applied for medical staff privileges at the Medical College of Georgia on December 21, 1999. His Application for privileges was signed by Dr. Zumbro and approved by Dr. Gadacz.

4.

On December 21, 1999, the same day that Dr. Mawulawde applied for medical staff privileges at the Medical College of Georgia, Dr. Zumbro wrote a letter to Dr. Gadacz recommending Dr. Mawulawde for medical staff appointment, stating that, "His ethics are above our standards. In addition he is personable and well liked by the nurses and his colleagues."

5.

On December 21, 1999, Dr. Gadacz wrote a letter to Dr. Charles Linder, the Chief of the Medical Staff at the Medical College of Georgia, requesting temporary privileges for Dr. Mawulawde effective January 1, 2000. The December 21, 1999 letter from Dr. Gadacz also provided that, "We are currently in the process of establishing a faculty appointment for Dr. Mawulawde. The paperwork is being completed and will be submitted to your office and the Dean's office next week. Until approval is granted for permanent privileges and the faculty appointment, temporary privileges will be needed." Dr. Gadacz's letter also provided that, "Dr. Mawulawde is currently associated with Cardiothoracic Surgery Associates of Augusta and has agreed to assist the Section of Cardiothoracic Surgery at MCG with their caseload." Dr. Mawulawde was not copied with Gadacz's December 21, 1999 letter and no paperwork was submitted to Dr. Linder regarding Dr. Mawulawde's faculty appointment during the week following Dr. Gadacz's December 21, 1999 letter.

6.

On December 30, 1999, Dr. Charles Linder and Patricia Sodomka, wrote a letter to Dr. Gadacz confirming the temporary appointment of Dr. Mawulawde to the MCG Medical Staff with privileges being granted in the Department of Surgery/Cardiothoracic for the time period of 90 days effective January 1, 2000 to March 30, 2000. Dr. Mawulawde was copied with the December 30, 1999 letter from Dr. Linder and Patricia Sodomka to Dr. Gadacz.

7.

From the time that he came to work at MCG in January, 2000, after Dr. Pai had left the previous December, Dr. Mawulawde worked at the V.A. Hospital and assumed the duties that Dr. Pai had occupied being "in charge of the V.A."[1] Dr. Mawulawde's duties included, supervising residents from the Medical College of Georgia while performing both chest cases and cardiac cases. During the time period when Dr. Mawulawde was in charge of the V.A., a resident of the Medical College of Georgia was always assigned there, and they rotated through with each resident spending a certain number of months under Dr. Mawulawde's supervision. The conferences held for Medical College of Georgia residents working at the V.A. Hospital would be held at the Medical College of Georgia. Dr. Gadacz approved of Dr. Mawulawde working at the V.A. Hospital.[2]

8.

On January 26, 2000, Dr. Gadacz again wrote Dr. Linder attaching Dr. Mawulawde's application for permanent hospital privileges effective March 1, 2000.

In his January 26, 2000 letter regarding Dr. Mawulawde, Dr. Gadacz indicated that, "He will continue to assist in providing attending coverage over the next several months and may eventually join the cardiothoracic surgery faculty on a part-time basis. Efforts are presently being made to recruit full-time faculty in that section. Dr. Mawulawde will help ease the burden of responsibility until the recruitment process is complete." Dr. Mawulawde was not copied with Dr. Gadacz's January 26, 2000 letter. Further, Dr. Gadacz's January 26, 2000 letter failed to mention Dr. Anstadt or that he had been offered a full time faculty position at the Medical College of Georgia.

9.

The defendants intentionally failed to inform Dr. Mawulawde of the full time faculty position vacancy at the Medical College of Georgia because they did not want him to apply for the position. Further, even though it was the practice at the Medical College of Georgia for physician faculty members to be first appointed for a faculty position prior to applying to be credentialed for the medical staff at the Medical College of Georgia, the defendants attempted to use the medical staff credentialing process before offering Dr. Mawulawde a faculty position in order to look for anything that could be used to justify refusing to offer Dr. Mawulawde a faculty position at the Medical College of Georgia even though they needed Dr. Mawulawde's skills and abilities in order to continue to pursue the residency program in cardiothoracic surgery at the Medical College of Georgia.

10.

Dr. Victor Moore, a white male, who was a long-time employee of MCG and who everybody knew, had problems with Dr. Mawulawde coming to MCG to be a surgeon because of Dr. Mawulawde's race as a black person. Dr. Moore made comments that he didn't want Dr. Mawulawde to come to MCG solely because he was a black person. Dr. Moore complained to Dr. Gadacz about Dr. Mawulawde coming to MCG and Dr. Moore made very strong racial slurs against Dr. Mawulawde. Dr. Moore also complained to Dr. Zumbro about Dr. Mawulawde being a cardiothoracic surgeon at the Medical College of Georgia, and referred to Dr. Mawulawde as a "nigger." Dr. Moore's racial animus against Dr. Mawulawde because of Dr. Mawulawde's race was well known within the Department of Surgery at the Medical College of Georgia. Dr. Moore had at one time himself been chief of the department of cardiothoracic surgery and he has been at MCG a long time and has a lot of influence.

11.

Instead of contacting Dr. Robert Barnes,[3] who was the Chief of the Department of Surgery during Dr. Mawulawde's training at the University of Arkansas, Pamela Whitehead[4] sent a letter to Dr. James E. Harrell, Jr., at the University Arkansas requesting information on Dr. Mawulawde. On February 25, 2000, Dr. James E. Harrell, Jr., Associate[5] Professor of Surgery at the University of Arkansas wrote Pamela Whitehead and confirmed to her that Dr. Mawulawde "was employed at the University of Arkansas for Medical Sciences as an Assistant Professor of Surgery and Director of Thoracic Organ Transplantation from

September 1995 until his departure in June 1997."
12.

When obtaining information while credentialing other similarly situated white physician faculty members at the Medical College of Georgia, Ms. Whitehead and other officials at the Medical College of Georgia, would seek information in writing directly from the persons who supervised the physician applying for medical staff privileges regarding their education, training and previous employment. Prior to Ms. Whitehead faxing a letter to Dr. Herrell requesting information about Dr. Mawulawde, the defendants knew that Dr. Harrell, who was not Dr. Mawulawde's superior during his employment at the University of Arkansas, would provide less than favorable information against Dr. Mawulawde even though he had not been Dr. Mawulawde's supervisor.

13.

The defendants wanted to delay Dr. Mawulawde's faculty appointment at the Medical College of Georgia until another person was hired to fill the vacant full time faculty position at the Medical College of Georgia in the cardiothoracic surgery department. Dr. Anstadt, the person who was selected for the full time vacant position within the cardiothoracic surgery department at the Medical College of Georgia was under contract at the Baylor School of Medicine and worked at the V.A. Medical Center in Houston, Texas for two years (July, 1998 - June, 2000) after he completed his general surgery training and thoracic surgery training in June, 1998 at Duke University.

14.

On March 2, 2000, Dr. Given[6] wrote a letter to Dr. Linder requesting and extension of temporary hospital privileges for Dr. Mawulawde. Dr. Given's letter stated that, "We are in a state of transition and rebuilding in CT. By June 30, we hope to have a better picture of how we're going to proceed. We have a contractual relationship with Dr. Mawulawde's practice through 6I30, so it seems best to us to maintain the current status through then." According to the letter, Dr. Zumbro was copied with Dr. Given's letter but Dr. Mawulawde did not receive a copy of this letter.

15.

On March 8, 2000, a letter from Kim Ruple of University of Arkansas to MCG suggesting that MCG contact Robert W. Barnes, MD, Chairman of the Department of Surgery regarding Dr. Mawulawde's professional capabilities. "We do not find any derogatory information in Dr. Mawulawde's medical staff file that would prevent us from recommending him to you."

16.

On March 27, 2000 a letter was written extending temporary privileges for Dr. Kwabena Mawulawde in the Department of Surgery, Section of Cardiothoracic Surgery for 90 days effective March 31, 2000 through June 30, 2000.

17.

On or about April 1, 20007,[7] Dr. Mark Anstadt filled a

vacant position in the cardiothoracic surgery department at MCG with an effective employment date of July 1, 2000. Dr. Mawulawde had not been made aware of the vacant, full time faculty position at MCG that was filled by Dr. Mark Anstadt on July 1, 2000 at a starting salary of $200,000 per year. Had he known that there was a full time vacant faculty position at MCG, effective July 1, 2000, Dr. Mawulawde would have applied for the position. The Position Assessment for the position filled by Mark Anstadt stated that, "This position was held previously by Dr. Reed Finney. This position is necessary to provide primary and backup attending physician coverage to CT patients and to allow all CT faculty to participate in section teaching, training, and research activities."

18.

After he had already been working at the VA Hospital and MCG to assist Dr. Zumbro with his obligations there, and after Dr. Anstadt was given a full time position in the department of cardiothoracic surgery at the Medical College of Georgia, on June 30, 2000, Dr. Mawulawde was notified that the Board of Regents of the University System of Georgia had approved his appointment as Assistant Professor in the Department of Surgery (Cardiac/Thoracic Surgery), with a time commitment of eighty percent (80%) MCG, effective August 1, 2000. Dr. Mawulawde's salary for 2000 was $120,000.

19.

On July 17, 2000, Rahn and Snell wrote Dr. Mawulawde a letter informing him that his appointment to the

Active Medical Staff of MCG with delineated privileges in the Department of Surgery had been approved by MCGHI, effective June 26, 2000.

20.

In all instances, Plaintiff was treated differently than similarly situated physicians on the medical staff at the Medical College of Georgia in the department of cardiothoracic surgery. Plaintiff contends that this treatment was intentionally done in order to prevent him from obtaining a full time faculty position for the Medical College of Georgia. Other similarly situated white physicians were appointed to a faculty position prior to applying for and obtaining privileges on the medical staff at the Medical College of Georgia.

21.

For example, on June 30, 2000, a letter was written requesting a full time faculty appointment for Dr. Wilson, a white male, to the Department of Surgery. Dr. Wilson's application for privileges on the medical staff at the Medical College of Georgia was filed in July 2000, after a definite faculty appointment had already been requested. Dr. Mawulawde, on the other hand, had to apply to be credentialed by the medical staff before he was formally offered a faculty position even though he performed work on behalf of the Medical College of Georgia prior to receiving his faculty appointment.

22.

When he began his employment at the Medical College

of Georgia, Dr. Anstadt started as a 100 percent full time employee (1.0 FTE) purportedly because he was going to spend all of his time at MCG. When he started at MCG, Dr. Anstadt's duties and responsibilities were very similar to Dr. Mawulawde's in the sense that they both helped residents, did clinical cases, and attended and organized conferences. Furthermore, they both worked at MCG and at University Hospital as well. When Dr. Anstadt came to the Medical College of Georgia, he understood from Dr. Zumbro that he would be assisting at University Hospital in addition to the Medical College of Georgia.

23.

Dr. Mawulawde and Dr. Anstadt performed similar duties and responsibilities. They both also worked similar hours, at similar locations and under similar working conditions. Further, their jobs required the same experience, training, and education. Despite the similarities in the requirements of their jobs and the similarities in the work that they performed, Dr. Anstadt was categorized as a full time employee and was paid more than Dr. Mawulawde.[8] In fact, Dr. Mawulawde had more responsibilities than Dr. Anstadt because in addition to performing his own cases, Dr. Mawulawde was required to help Dr. Anstadt on most of the heart cases that Dr. Anstadt performed. Dr. Anstadt asked Dr. Mawulawde to help him directly and Dr. Zumbro also encouraged Dr. Mawulawde to help Dr. Anstadt with surgical cases.

24.

During the time that they were both employed at MCG,

MCG provided funding to Dr. Anstadt to do research but MCG did not provide funding for Dr. Mawulawde to perform research. Dr. Mawulawde was supportive of Dr. Anstadt's research after Dr. Anstadt came to MCG even though Dr. Mawulawde did not receive funding or assistance from the Medical College of Georgia to perform research. Dr. Mawulawde was to do research but he was never given the opportunity to do so even though he asked numerous times.

25.

On June 15, 2001, Dr. Rahn wrote Dr. Mawulawde and informed him that he "had been reappointed to the faculty of the Medical College of Georgia as Assistant Professor in the Department of Surgery, School of Medicine, for the 2001-02 year." Dr. Zumbro closed his private practice in July, 2001 because he had some personal cardiac difficulties and he was getting burnt out. On October 19, 2001, the Board of Regents approved Dr. Zumbro's change of status to full time effective October 11, 2001.9 At the same time that Dr. Zumbro made a commitment to work full time at MCG, Dr. Mawulawde made a commitment to work full time at MCG and/or the V.A. Hospital because Dr. Zumbro's practice was closed in July 2001. Even though Dr. Gadacz considered Dr. Mawulawde full time, and even though he worked at MCG full time, on paper, Dr. Mawulawde only became a 95 %1° employee after Dr. Zumbro's medical practice was closed. The defendants failed to make Dr. Mawulawde a full time employee categorized as 1.0 FTE because they did not want Dr. Mawulawde to enjoy the benefits, privileges and protections, to include due process," that is enjoyed by white faculty physician employees who were classified

as full time employees while working in the Cardiothoracic Surgery Department at the Medical College of Georgia.

26.

On November 7, 2001, Dr. Zumbro went on disability leave and exhausted his annual and sick leave on March, 31, 2002. He did not return to work in his position as chief and he retired on medical disability. Even though he did not physically work as chief of the cardiothoracic surgery department after November 7, 2001, Dr. Zumbro officially left the position of chief of cardiothoracic surgery on June 30, 2002.

27.

After Dr. Zumbro went on disability leave in November 2001, Dr. Mark Anstadt served as interim chief of the cardiothoracic surgery department at MCG. Dr. Anstadt remained in the position as cardiothoracic surgery interim chief from November, 2001 until Dr. Landolfo arrived in July 2003. However, Dr. Mawulawde served as interim chief during the time periods when Dr. Anstadt was unable to do so due to military leave.

28.

When Dr. Zumbro resigned Dr. Stern offered Dr. Mawulawde and Dr. Anstadt co-chairs of the section even though Dr. Anstadt never officially applied for the position. 12 Dr. Anstadt and Dr. Mawulawdd both opposed being co-chiefs of the cardiothoracic surgery department at MCG.

29.

After he notified MCG that he wanted to become the chief of the cardiothoracic surgery department at MCG, Dr. Mawulawde was informed that MCG was looking for someone with experience in pediatric cardiothoracic surgery. Dr. Gadacz wrote Dr. Mawulawde a letter on September 7, 2001 and informed him that MCG was looking for a new chief with "an emphasis on pediatric cardiac experience."

30.

When Dr. Zumbro stepped down as chief of the cardiothoracic surgery department, Dr. Gadacz formed a search committee chaired by Dr. Charles Howell," and there were representatives from the department of surgery, department of medicine, department of pediatrics placed on the committee to review candidates for the position of chief of cardiac surgery.

31.

On February 21, 2002, Dr. Gadacz prepared a letter to Dr. Merrill," a white male, telling him that his interviews "were very favorable" and that "we are very interested in recruiting you as chief of cardiothoracic surgery." Dr. Merrill was Dr. Gadacz's first choice to be chief after Dr. Zumbro left. Dr. Merrill had a weak academic resume, and little research interest.

32.

On March 4, 2002, Dr. Merrill was still interested and

was waiting to hear back from the committee after his second visit." In a March 4, 2002 email, Howell indicated that, "Our next person to interview after Dr. Yeh is Dr. Mawulawde who is the current Chief of CT at the VA Hospital. We have not arrived at a date to do that interview with him, but I will work on it." Dr. Howell indicated that Dr. Yeh was coming to be interviewed on March 21, 2002 and March 22, 2002 for the positions of chief of CT and chief of pediatric CT. Even though he had expressed interest in the position of Chief of the Cardiothoracic Surgery Department at the Medical College of Georgia in the fall of 2001, Dr. Mawulawde was not given an interview until after several other physicians who were not Black had been interviewed.

33.

While Dr. Howell was attempting to maintain Dr. Diehl's interest and while he was waiting for Dr. Yeh to make up his mind whether or not he was going to come, Dr. Mawulawde still had not been interviewed for the position. Debbie Clark" complained about the failure to schedule Dr. Mawulawde, the only internal applicant, for an interview after the other outside applicants had been interviewed, some of them twice, for the position of Chief of the Cardiothoracic Surgery Department at the Medical College of Georgia. Clark told Howell that she thought Dr. Mawulawde was being discriminated against because he was not given the opportunity to interview for the position of chief of the cardiothoracic surgery department at the Medical College of Georgia. When speaking to Dr. Gadacz about the failure to interview Dr. Mawulawde, Clark told Dr. Gadacz that "Dr. Mawulawde was a great surgeon, his patients did

well, everybody spoke highly of him in the O.R., and that, you know, what a great thing for the community and MCG, for us to have a black cardiothoracic surgeon."

34.

On April 3, 2002, prior to Dr. Mawulawde being interviewed, Dr. Howell, the Chairman of the search committee, wrote an email to the search committee and informed them that, "we have recently had 2 quality candidates to interview for the position of Chief of CT Surgery." The email also indicated that Dr. Diehl had completed his second interview and Dr. Yeh was reluctant to return for his second interview because he was not convinced that MCG could have the volume to maintain the surgical activity that he feels is necessary for him to remain competent. In closing, the email, Howell stated that, "My time constraint seems to be as tight as a `noose' around my neck, if you know what I mean. . . ."

35.

On April 25, 2002, Dr. Howell sends an email to the search committee informing the members that, "Dr. Hall, an Adult CT surgeon from UCSF, would like to come on May 12 and interview on May 13 and 14. I will be sending you a CV by fax tomorrow," and that, "we are setting up Dr. Mawulawde to be interviewed on May 9-10." Dr. Mawulawde was not scheduled for an interview until May 9, 2002 even though the committee had his CV since March 9, 2002.

36.

On Sunday, May 12, 2002, when corresponding with the selection committee, Dr. Howell indicated that if Dr. Yeh is not interested in coming "if he can't be overall chief then we have to make a decision, Yeh, Diehl or Mawulawde." On June 18, 2002, Curt Steinhart wrote the committee members and informed them that, "Dr. Yeh will only come as Chief of the Section of CT Surgery and although we may find a better adult CT surgeon to head the section, we will have a major gap on the Peds side. Also, we have already on the faculty, two adult CT surgeons who are quite capable." Dr. Yeh did not accept the position with MCG and Dr. Diehl did not accept the position with MCG.

37.

On July 22, 2002, Dr. Rahn wrote Dr. Mawulawde and informed him that he had "been reappointed to the faculty of the Medical College of Georgia as Assistant Professor in the Department of Surgery, School of Medicine, for the 2002-03 year." Rahn's July 22, 2002 letter indicated that Dr. Mawulawde's appointment was being made "in accordance with 803.1101 of the Policy Manual of the Board of Regents."

38.

The search committee took no action after June, 2002 until they heard from Dr. Kevin Landolfo over six months later and over a year after Dr. Mawulawde had first expressed interest in the position of chief of the cardiothoracic surgery department at the Medical College of Georgia. On Wednesday, December 18, 2002, Dr. Gadacz wrote an email to Charles Howell and the

other members of the search committee and informed them of the "intent to invite Dr. Kevin Landolfo for a visit to interview as Chief of Cardiac Surgery. He expressed his interest through Dr. Steve Schwab, our Chair of Medicine."
39.

After Landolfo first met Stern in December, 2002, in January, 2003, during the first week after the holidays, Landolfo visited MCG during his first visit for approximately two and a half days and [he] met with a lot of people including David Stern; Dan Rahn; Curt Steinhart; Steve Schwab; Ralph Caruana; John Contravis; and Clinton Webb." Landolfo returned for his second visit at the end of January and he definitely met with Don Snell at one of those visits. When Landolfo met with David Stern at Duke the first time Stern encouraged Landolfo of the concept of trying to create a vision.

40.

For a 90 day period beginning in March, 2003, Dr. Mawulawde was the only adult cardiothoracic surgeon working at MCG. Dr. Anstadt was on military leave during this time period and Dr. Mawulawde also served as interim section chief,[17] where he had to be responsible for the administrative affairs of the section in addition to all of the clinical care for all of the patients there. During this time he was also responsible for teaching the residency- -the residents, the fellows there and the residents.

41.

Because it was a lot of responsibility for one person, Dr. Gadacz actually suggested that Dr. Mawulawde contact some of the cardiothoracic surgeons in town to help him cover the service but Dr. Mawulawde said that the felt comfortable taking on all of the responsibility and Dr. Gadacz "thought he did a very good job."

42.

On April 12, 2003, prior to the effective date of his employment at the Medical College of Georgia, Dr. Landolfo[18] wrote a letter to Dr. Jim St. Louis, a white male, stating that, "It is a pleasure to offer you an appointment to the full-time faculty of the Medical College of Georgia as Assistant Professor (tenure track) in the Section of Cardiothoracic Surgery, in the Department of Surgery, School of Medicine, at 1.00 EFT effective July 1, 2003... Your initial compensation will be $275,000."

43.

Dr. Victor Moore, a white male, was a pediatric cardiac surgeon who worked in the cardiothoracic surgery department when Dr. Mawulawde and Dr. Anstadt worked at MCG. When Dr. Jim St. Louis came to MCG from Duke, he came with the understanding that Dr. Victor Moore would remain on contract until Dr. St. Louis felt comfortable doing pediatric cases independently.

44.

Despite the fact that Dr. Mawulawde was taking on all of the added responsibility after Dr. Anstadt left to go

on military leave in March, Dr. Mawulawde received no extra compensation and was not otherwise paid for the extra work, duties and responsibilities that he undertook during Dr. Anstadt's three month leave of absence.

45.

On June 15, 2003, Dr. Rahn wrote Dr. Mawulawde and informed him that he had "been reappointed to the faculty of the Medical College of Georgia as Assistant Professor in the Department of Surgery, School of Medicine, for the 2003-04 year." Rahn's June 15, 2003 letter indicated that Dr. Mawulawde's appointment was being made "in accordance with 803.1101 of the Policy Manual of the Board of Regents."

46.

After he was hired to become the chief of the cardiothoracic surgery department at the Medical College of Georgia, Dr. Landolfo came in making considerably more than what Dr. Zumbro was making before he resigned and quite a bit more that Dr. Mawulawde was making before he was terminated. Immediately after he arrived at the Medical College of Georgia, Dr. Landolfo told Debra Clark, "day one," not to put Dr. Mawulawde on the call schedule anymore.

47.

On August 29, 2003, Dr. Gadacz wrote Dr. Mawulawde and informed him of the termination of his faculty appointment in the Department of Surgery at the Medical College of Georgia effective December 31, 2003.

Dr. Anstadt was formally notified that his contract for the 2004-2005 academic year would not be renewed in September, 2003 but unlike Dr. Mawulawde, he was allowed to complete his employment contract for the 2003-2004 academic year.

48.

When he was finishing out his contract at MCG, Dr. Anstadt became employed at another institution in Dayton, Ohio and was receiving pay from both institutions. Dr. Mawulawde was not given the opportunity to find another position before he was terminated from the Medical College of Georgia. The officials at the Medical College of Georgia assisted Dr. Anstadt in finding other employment after the termination of his employment at the Medical College of Georgia.

COUNT VII 42 U.S.C. § 1981

49.

The adverse actions contained under this count may be pursued pursuant to Plaintiff s claims asserted under Count I (42 U.S. C. § 1983) of the original Complaint filed on September 2, 2004 in the Superior Court of Fulton County to the extent that said acts and omissions described herein were committed while the Medical College of Georgia and/or the Board of Regents of the University System of Georgia, their employees, agents, and/or representatives were acting under color of state law. See Butts v. County of Volusia, 222 F.3d 891 (11th Cir. 2000).

Further, the Board of Regents of the University System of Georgia adopted official policies and customs relating to the hiring, retention, promotion and termination of employees that were intentionally not followed by the employees, officers, agents and representatives of the Medical College of Georgia with respect to Dr. Mawulawde during his employment at the Medical College of Georgia. As such, Dr. Mawulawde was deprived of the due process protections afforded by the policies and customs adopted by the Board of Regents of the University System of Georgia which were enacted with the purpose of preventing discrimination in the employment of faculty at the Medical College of Georgia based upon race. The acts and omissions of the individual defendants hereinbefore alleged regarding the hiring, retention, promotion and termination of Dr. Mawulawde that were not in compliance with official policies that were adopted and ratified by the final policymakers of the Board of Regents of the University System of Georgia and the Medical College of Georgia subjecting the defendants to liability individually, jointly, and severally pursuant to 42 U.S. C. § 1983. To the extent that it is determined that the individual's actions were not authorized, the individual defendants would be liable pursuant to 42 U.S. C. § 1981, as amended by the Civil Rights Act of 1981.

50.

Failure to Promote.

The Medical College of Georgia and/or the Board of Regents, through the acts and omissions of their employees, agents and/or representatives' failed to

promote Dr. Mawulawde to the position of Chief of the Cardiothoracic Surgery Department at the Medical College of Georgia from November, 2001 through December, 2002, and failed to otherwise allow him to enter into a contract for the position of Chief of the Cardiothoracic Surgery Department at the Medical College of Georgia from November, 2001 through December, 2002, solely because of his race (Black) and/or national origin (Jamacian) thereby constituting a violation of 42 U.S. C. § 1981, as amended by the Civil rights Act of 1991. The defendants are liable, individually, jointly and severally pursuant to 42 U.S. C. § 1981, as amended by the Civil rights Act of 1991.

51.

Wrongful Discharge (Termination).

On July 1, 2003, Dr. Mawulawde began working on a 12 month contract for $220,000, as an Assistant Professor at the Medical College of Georgia that was set to expire on June 30, 2004. Dr. Mawulawde performed all of his duties, obligations, and responsibilities under the contract. On December 31, 2003, the Medical College of Georgia and the Board of Regents of the University System of Georgia, terminated Dr. Mawulawde's employment contract, without cause, solely because of his race (Black), and/or his national origin (Jamacian) in violation of 42 U.S. C. § 1981, as amended by the Civil rights Act of 1991. The defendants are liable, individually, jointly and severally pursuant to 42 U.S. C. § 1981, as amended by the Civil rights Act of 1991.

52.

Unequal Pay & Fringe Benefits.

Throughout his employment at the Medical College of Georgia, Dr. Mawulawde performed similar duties as Dr. Anstadt, a white male, but Dr. Mawulawde received less pay than Dr. Anstadt and did not receive the same fringe benefits as Dr. Anstadt in violation of 42 U.S. C. § 1981, as amended by the Civil rights Act of 1991. The defendants are liable, individually, jointly and severally pursuant to 42 U.S. C. § 1981, as amended by the Civil rights Act of 1991.

53.

Failure to Make Full Time Employee.

The Medical College of Georgia and the Board of Regents of the University System of Georgia failed to inform Dr. Mawulawde of the full time position vacancy in the cardiothoracic surgery department at the Medical College of Georgia that was filled by Dr. Mark Anstadt, a white male, on July 1, 2000. As such, the defendants intentionally prevented Dr. Mawulawde from seeking to enter into a contract for the full time faculty position filled by Dr. Anstadt by leading him to believe that they were attempting to provide him with a faculty position at the Medical College of Georgia.

54.

On December 21, 2001, the Medical College of Georgia and the Board of Regents, through their agents, employees and representatives, changed Dr. Mawulawde's employment status from .80 FTE to .95 FTE. In addition to failing to make him a full time

employee for the 2001-2002 academic school year, the defendants failed to make Dr. Mawulawde a full time employee and/or otherwise failed to allow him to enter into a contract as a full time employee for the 2002-2003 academic school year and the 2003-2004 academic school year, solely because of his race (Black), and/or his national origin (Jamaican). Because the defendants did not change Dr. Mawulawde's employment status to 1.0 FTE on December 21, 2001, and thereafter, they violated 42 U.S. C. § 1981, as amended by the Civil rights Act of 1991, because they deprived him of equal benefits, to include the due process rights enjoyed by full time white faculty members, solely because of his race (Black) and national origin (Jamacian). The defendants are liable, individually, jointly and severally pursuant to 42 U.S. C. § 1981, as amended by the Civil rights Act of 1991.

COUNT VIII BREACH OF CONTRACT

55.

On June 15, 2003, Dr. Mawulawde was reappointed[19] as an Assistant Professor in the cardiothoracic surgery department at the Medical College of Georgia to serve July 1, 2003 through June 30, 2004 at a salary of $220,000. On July 1, 2003, Dr. Mawulawde began performing under his contract to serve as an Assistant Professor in the cardiothoracic surgery department at the Medical College of Georgia from July 1, 2003 through June 30, 2004. On December 31, 2003, Dr. Mawulawde's contract was terminated notwithstanding Dr. Mawulawde's intent and ability to perform his duties, obligations and responsibilities under the contract. The defendants Medical College of Georgia

and the Board of Regents of the University System of Georgia, together with their officers, employees, agents and representatives are liable for breach of contract under Georgia law for terminating Dr. Mawulawde's contract prior to the expiration of the term provided therein.

WHEREFORE, Plaintiff prays for judgment and relief against the defendants as follows:

(A) Injunctive relief ordering the Defendants to reinstate Plaintiff to his position as Assistant Professor, Cardiothoracic Surgery at the Medical College of Georgia;
(B) Compensatory damages from the Defendants individually, jointly and severally, said compensatory damages to include back pay, front pay, and fringe benefits in an amount to be determined at trial;

(C) Punitive damages against the individual defendants, jointly and severally, in an amount to be determined at trial;

(D) Damages as a result of the defendants breach of contract;

(E) Plaintiff demands a trial by jury;

(F) Costs and attorney fees associated with the prosecution of this action; and

(G) Such further and other relief authorized by 42 U.S. C. § 1981, as amended by the Civil Rights Act of 1991, and/or as the Court deems equitable, just and proper.

This 6th day of June, 2008.

Respectfully Submitted,
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Footnotes

[1]While employed by the Medical College of Georgia, Dr. Pai had served as Chief of the Cardiothoracic surgery department at the V.A. Hospital in Augusta, Georgia.
[2]Dr. Mawulawde could have been appointed full time while working at both the V.A. Hospital and the Medical College of Georgia because MCG has a relationship with the V.A. Hospital that allows the Medical College of Georgia to have what is considered full-time faculty that have part-time appointments at the VA and at MCG that totals a 1.0 FTE.
[3]On February 23, 2000, Dr. Read, Chief of General Thoracic Surgery wrote a letter to Pamela Whitehead informing her to contact Dr. Nicholas Lang, Chief of

Surgery at the VA Hospital, and Dr. Robert Barnes, Department of Surgery, University of Arkansas for information regarding Dr. Mawulawde's qualifications.

[4]During all times relevant hereto, Pamela Whitehead was employed by the Medical College of Georgia as the medical staff coordinator.

[5]In addition to deferring to the Chairman of the Department of Surgery during Dr. Mawulawde's employment, Dr. Harrell stated that, "I am personally not in a position to comment on the performance of Dr. Mawulawde. Due to previous legal situations surrounding his employment I have been advised not to comment."

[6]At this time Dr. Kenna Given was Acting Chair, Department of Surgery, while Dr. Gadacz was out on medical leave.

[7]This was several months after Dr. Mawulawde had begun working at MCG for Dr. Zumbro and several months before MCG officially appointed Dr. Mawulawde to the position of Assistant Professor in the Department of Cardiothoracic Surgery.

[8]Dr. Anstadt was paid more that Dr. Mawulawde throughout the time period that they were working at the Medical College of Georgia. At the time when Dr. Mawulawde was terminated after Dr. Landolfo was hired, Dr. Mawulawde was being paid $220,000 per year and Dr. Anstadt was being paid $260,000 per year. Dr. Mawulawde was terminated though in December 2003 so he was unable to earn his entire contract amount while Dr. Anstadt was paid his entire contract amount for the 2003-2004 year.

[9]There was also noted on the form officially changing Dr. Zumbro's status to full time that, "change in work commitment from .9 to 1.0 effective August 1, 2001. No change in funding or salary."

[10]On December 21, 2001, Dr. Wray wrote Dr. Mawulawde and informed him that, the Board of Regents had approved his change in commitment from (.80%) MCG to (.95%) MCG, effective August 1, 2001.

[11]The Board of Regents' policies provide that a full time faculty member can not be terminated prior to the expiration of his or her contract term without cause unless such termination is in accordance with the due process rights provided by said policies.

[12]Although he also coveted the position of chief of the cardiothoracic surgery department, Dr. Anstadt interviewed Dr. Mawulawde for the position of chief of cardiothoracic surgery at the Medical College of Georgia.

[13]Dr. Howell reported to Dr. Gadacz, chairman of the department of surgery at MCG. Dr. Howell's title is Chief of Pediatric Surgery. Dr. Howell, who first attended medical school at MCG in 1970, does not know of any Black person who has ever served as section chief within the department of surgery at MCG.

[14]Two of the first physicians interviewed for the position of chief of the cardiothoracic surgery department at MCG, Dr. Jim Diehl and Dr. Walter Merrill were not pediatric cardiac surgeons but both adult cardiothoracic surgeons.

[15]At the time that it was determined that Dr. Mawulawde would be interviewed for the chief position, some physicians had been interviewed twice.

[16]As part of her job duties Debbie Clark would schedule and arrange the interview of any person that Dr. Howell told her he wanted to interview.

[17]Dr. Anstadt was notified in writing by Dr. Gadacz that Dr. Mawulawde was appointed interim section chief in Dr. Anstadt's absence.

[18]Dr. Landolfo wrote the letter in his capacity as Robert

G. Ellison MD Chair, Professor and Chief Cardiothoracic Surgery. Dr. Gadacz also signed the letter in his capacity as chairman of the department of surgery.

[9]In addition to part time work that began in the year 2000, Dr. Mawulawde had already successfully performed two previous one year contracts for the Medical College of Georgia during the 2001-2002 academic school year and the 2002-2003 academic school year.